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No. _____

In The

Supreme Court of the United States

October Term, 1994

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS; DERALD KERBY, WARDEN, CENTRAL NEW MEXICO CORRECTIONAL FACILITY,

Petitioners,

v.

WILLIAM SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED

A. Whether actual prejudice suffered by the State of New Mexico – founded on the practical inability to retry a criminal case some eighteen years after a state court jury rendered two first-degree murder guilty verdicts – is a legitimate factor in determining whether to grant equitable relief in a federal habeas corpus action?

B. Whether the United States Court of Appeals for the Tenth Circuit's comprehensive and mandatory review of each and every federal habeas corpus appeal, irrespective of the denial of a certificate of probable cause by the District Court, is directly contrary to the language and legislative intent of 28 U.S.C. § 2253 (1994)?

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No. _____

In The

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SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS; DERALD KERBY, WARDEN, CENTRAL NEW MEXICO CORRECTIONAL FACILITY,

Petitioners,

v.

WILLIAM SMITH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Secretary of New Mexico Department of Corrections and Derald Kerby, Warden of the Central New Mexico Correctional Facility, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 50 F.3d 801 (10th Cir.

1995). (App. A). The opinion of the New Mexico Supreme Court is titled *State of New Mexico v. William J. Smith* and is reported at 591 P.2d 664 (N.M. 1979). (App. F).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit entered its judgment on March 7, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1993).

STATUTORY PROVISIONS INVOLVED

This Petition involves three statutory provisions concerning federal habeas corpus claims.

28 U.S.C. § 2243 (1994), in pertinent part:

> The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2253 (1994), in pertinent part:

> In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.
>
> * * *
>
> An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court,

unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. § 2254(a) (1977):

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

A. Proceedings Below

1. New Mexico State Court

This Petition evolves from the August 9, 1977 murders of two young women, Leslie McDonnell and Cari Talton. Their bodies were found in rural Torrance County, New Mexico. Following an investigation conducted by the Albuquerque Police Department, Smith and a co-defendant were charged with the crimes of first-degree murder, kidnapping, accessory to murder, and accessory to kidnapping. The first trial ended in a mistrial; eleven jurors voted for guilty verdicts, one juror voted for acquittal. Smith was tried a second time. Smith was declared guilty of two first-degree murders by a New Mexico jury. The state trial court sentenced Smith to two consecutive life sentences.

A direct appeal followed in the New Mexico Supreme Court on March 20, 1978. Fourteen issues were raised

including sufficiency of the evidence. Smith's two first-degree murder convictions were affirmed on February 27, 1979. (App. F). Regarding the claim of insufficiency of the evidence, the New Mexico Supreme Court concluded: "After reviewing the record, we find that each element of the crimes charged is supported by substantial evidence." App. F, at 9.

On April 4, 1983, Smith filed a motion for post-conviction (Rule 57) relief. A comprehensive evidentiary hearing was held. The Court's Findings of Fact and Conclusions of Law was filed on February 24, 1984. (App. E). State District Court Judge Cole rejected Smith's claims and denied any post-conviction relief. (App. E).

Smith filed a state habeas corpus petition on May 29, 1984. In this petition, Smith asked for a second evidentiary hearing. After a writ proceeding before the New Mexico Supreme Court, this evidentiary hearing was barred by a decision issued October 28, 1985 by the New Mexico Supreme Court. *State ex rel. Sullivan v. Kaufman*, 708 P.2d 322 (N.M. 1985).

2. United States District Court for the District of New Mexico

Over seven years ago, on March 3, 1988, Smith filed a petition in the United States District Court for the District of New Mexico seeking federal habeas corpus relief. 28 U.S.C. § 2254 (1977). Many of the issues reviewed by the New Mexico Supreme Court were raised in this collateral proceeding.

Extensive review of all New Mexico state court proceedings and full briefing took place. For example, the

breadth of the state court record evaluation is demonstrated by the fact Magistrate Judge Garcia reviewed every tape of the trial and post-conviction (Rule 57) evidentiary hearing before Judge Cole. (App. D, at 6: "I reviewed the tapes of the Rule 57 hearing and find the factual determinations supported by the record." and, at 15: "I reviewed the trial tapes and the tapes of the Rule 57 hearing. . . . ").

On May 24, 1993, Magistrate Judge Garcia filed the Magistrate Judge's Proposed Findings and Recommended Disposition.[1] Magistrate Judge Garcia advised the petition be dismissed with prejudice. (App. D). The United States District Court, by Judge Campos, agreed with this recommended disposition and denied the petition. (App. C, Order, June 24, 1993).

Smith was denied a certificate of probable cause (28 U.S.C. § 2253 (1994)) by the District Court after a finding no substantial issue of law was presented. (App. B, Order, August 24, 1993).

3. United States Court of Appeals for the Tenth Circuit

Irrespective of the fact the District Court denied a certificate of probable cause, the United States Court of

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[1] The Opinion engages in an extensive analysis of the delay in the District Court and criticizes the magistrate judges. *See* App. A, at 44 n.30. No effort, however, was made by Smith to expedite the proceedings in District Court. *See Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (petition for writ of mandamus is an appropriate remedy for a fourteen-month delay in district court habeas proceeding).

Appeals for the Tenth Circuit ordered briefing, heard oral argument, and then granted the certificate of probable cause in its March 7, 1995 decision. Jurisdiction of the Tenth Circuit was conferred by 28 U.S.C. § 1291 (1993).

The decision of the District Court denying federal habeas corpus relief was reversed because the prosecution improperly withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Smith's two 1978 first-degree murder convictions were vacated and the cause remanded for a new trial within ninety days or, in the alternative, to grant the permanent release of Smith from state custody. The ninety-day period expires July 19, 1995.

Concurrent with the filing of this Petition, Petitioners have filed for a stay of any District Court and New Mexico state court proceedings. Sup. Ct. R. 23.

B. Facts Relevant to the Questions Presented

Facts relevant to the first question presented include the following findings made by both the New Mexico state court after a full evidentiary hearing and an acknowledgment of the lengthy proceeding by the Tenth Circuit in the Opinion.

The prejudice suffered by the State of New Mexico in its ability to retry Smith is aptly demonstrated throughout the record. The first instance establishing actual prejudice is contained in the Court's Findings of Fact and Conclusions of Law issued on February 24, 1984. (App. E). In particular, paragraphs 40 and 41 address the issue of prejudice suffered by the State of New Mexico because

of Smith's delay in filing the state habeas corpus petition as well as his escape from custody:

> 40. The state has been irreparably prejudiced by the failure of the defendant to timely file this motion because of the deterioration of the memories of the witnesses and the destruction of the physical evidence.
>
> 41. A portion of the delay in presenting the matter is attributable to defendant's escape from the penitentiary and his unavailability until recaptured in Hawaii.

(App. E, at 11-12).

The Tenth Circuit's recognition of the extraordinary delay between the 1978 state court convictions and federal habeas corpus review is reflected in the following statement: "As is often the situation in many habeas corpus appeals, the sheer volume of the record, coupled with the factual complexity of the case *and its age*, makes our efforts *to reconstruct what took place many years ago all the more difficult.*" App. A, Opinion, at 2 n.2 (emphasis added).

Facts relevant to the second question are contained within the Opinion. The Opinion discusses the procedural posture of the case including the fact a certificate of probable cause (as required by 28 U.S.C. § 2253 (1994)) was denied by the lower court. The granting of the certificate of probable cause was decided after full briefing, review of the entire record, and oral argument. A certificate of probable cause was issued by the Tenth Circuit at the time the Opinion was filed on March 7, 1995.

Curiously, the Tenth Circuit acknowledges the discretionary nature of appellate review from the denial of

federal habeas corpus relief. The Opinion comments: "As we discuss below, the requirements that a habeas petitioner obtain a certificate of probable cause to appeal is a prerequisite to appellate jurisdiction; thus, the district court's refusal to grant a certificate of probable cause to appeal would limit our jurisdiction." Opinion, App. A, at 2 n.1.

In the discussion of procedural issues on appeal, the Opinion again recognizes the "jurisdictional matter regarding the availability of a certificate of probable cause to appeal. . . . " and that "[t]he statutory certificate of probable cause is a jurisdictional prerequisite to appeals from final orders in habeas corpus proceedings," (citation omitted). (App. A, Opinion, at 39-40). The Opinion states: "There is no automatic right to appeal a district court's order denying federal habeas corpus relief." (Opinion, App. A, at 41).

Yet, despite these various pronouncements of law, the Tenth Circuit's procedure clearly reflects a mandatory, not discretionary, review of a denial of federal habeas corpus relief.

REASONS FOR GRANTING THE WRIT

Petitioners seek this Court's review of two critical issues concerning the very nature and purpose of federal habeas corpus review of Smith's 1978 New Mexico state court conviction for two first-degree murders. The first question presented involves the strong and recognized interest of the State of New Mexico in the finality of a criminal conviction. This interest is especially significant

when eighteen years have elapsed and the legality of Smith's two first-degree murder convictions has been reviewed by three different courts before the Tenth Circuit's ultimate evaluation and vacation of Smith's two first-degree murder convictions. Actual prejudice is suffered by the State of New Mexico, its citizens and the families of Leslie McDonnell and Cari Talton when the ability to retry is severely compromised due to the repeated and lengthy review process in this federal habeas corpus proceeding.

The second question requires this Court to evaluate and determine whether the United States Court of Appeals for the Tenth Circuit properly follows the procedures for a direct appeal from the denial of a federal habeas corpus petition. The process employed by the Tenth Circuit effectively nullifies the discretionary review mandated by 28 U.S.C § 2253 (1994). The denial of a certificate of probable cause by the District Court is a meaningless act.

A. ACTUAL PREJUDICE SUFFERED BY THE STATE OF NEW MEXICO, FOUNDED ON THE PRACTICAL INABILITY TO RETRY SMITH AFTER AN EIGHTEEN-YEAR LAPSE OF TIME FROM SMITH'S TWO FIRST-DEGREE MURDER CONVICTIONS, IS A PROPER CONSIDERATION IN DETERMINING WHETHER FEDERAL HABEAS CORPUS RELIEF SHOULD BE GRANTED.

The first question asks this Court to evaluate the principles of federalism and the authority of a federal

court, some eighteen years after a New Mexico state court criminal conviction, to effectively negate the conclusions of both state and federal courts as to the validity and legality of Smith's two-first degree murder convictions. Should the State of New Mexico and the families of Leslie McDonnell and Cari Talton rely on the finality of Smith's two first-degree murder convictions or is the concept of finality simply an illusion? The families of Leslie McDonnell and Cari Talton, the State of New Mexico, as well as the citizens of New Mexico have a legitimate interest in the finality of Smith's 1978 two first-degree murder convictions. Petitioners ask this Court not only to reaffirm this important interest but to find this interest is a countervailing factor in determining whether federal habeas corpus relief should be granted.

Petitioners' argument is grounded on the fact federal habeas corpus is an extraordinary equitable remedy. *Fay v. Noia*, 372 U.S. 391, 438 (1963). Equity requires due regard and respect towards the interests of the State of New Mexico in the finality of a criminal conviction. This interest of finality is upset by the practical inability to retry a case some eighteen years after the issuance of the jury's verdicts finding Smith guilty of two first-degree murders. *See Smith v. Duckworth*, 910 F.2d 1492, 1494 (7th Cir. 1990) (doctrine of laches requires not only unreasonable delay but also that the delay work to the detriment of the other party). Equitable principles cannot mandate that a federal court order a remedy that is not constitutionally compelled "beyond the bounds of justice and good sense." *Vasquez v. Hillery*, 474 U.S. 254, 282 n.15 (1986) (Powell, J., dissenting). "Postponement of the adjudication of issues for years can harm both the prisoner

and the State and lessens the probability that full disposition of the case will do substantial justice." *Peyton v. Rowe*, 391 U.S. 54, 62 (1968). The harm is caused when a perpetual disrespect for the finality of state court convictions "disparages the entire criminal justice system." *McCleskey v. Zant*, 499 U.S. 467, 492 (1991).

A genuinely significant societal policy is served by finality of state court criminal convictions. This societal interest has been discarded. "Confidence in our system of justice is eroded when one found guilty of murder, in a trial conceded to be fair, is set free. It is important to remember that the criminal law's aim is twofold: 'that guilt shall not escape or innocence suffer.' " *Vasquez*, 474 U.S. at 282 n.16 (Powell, J., dissenting) (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

When the process of direct appeal comes to an end, a presumption of finality and legality attaches to the conviction and sentence. *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). A writ of habeas corpus "strikes at finality." *McCleskey v. Zant*, 499 U.S. at 491. "One of the law's very objects is the finality of its judgments." *Id.* Habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Harris v. Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting). *See O'Neal v. McAninch*, ___ U.S. ___, 115 S.Ct. 992, 130 L.Ed.2d 947, 956 (1995) (state's interest in avoiding retrial of individuals is "legitimate and important").

As recently noted in *O'Neal v. McAninch*, 130 L.Ed.2d at 958, a federal habeas court "may not upset the results of a criminal trial unless it concludes both that the trial was marred by a violation of the Constitution" and that the "error was harmful." (Thomas, J., dissenting). When a habeas petitioner obtains a new trial, the state is placed at a disadvantage "through the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time." *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 127-128 (1982)). As such, habeas cases "indicate that upsetting the finality of judgments should be countenanced only in rare instances." *O'Neal v. McAninch*, 130 L.Ed.2d at 959 (Thomas, J., dissenting).

Justice Powell's dissenting opinion in *Vasquez v. Hillery*, 474 U.S. at 267-268, emphasizes the untenable consequence when a prisoner must be set free, unless a state is able to reconvict, more than two decades after a murder. "It is difficult to reconcile this result with a rational system of justice." *Id.* Justice Powell further writes about the critical relevance of an extraordinary lapse of time between a state court conviction and the granting of federal habeas corpus relief: "It is now almost a quarter-century since respondent was tried for murder and since the discrimination occurred. The Court finds this time lapse irrelevant. In my view, it is critically important, because it both increases the societal cost of the Court's chosen remedy and lessens any deterrent force the remedy may otherwise have." *Vasquez*, 474 U.S. at 280-281 (Powell, J., dissenting).

Justice Powell's proclamation is remarkably appropriate and applicable in this case because of the

destruction of physical evidence and fading memories: "Even where credibility is not central, the passage of time may make the right to retry the defendant 'a matter of theory only.' " *Vasquez*, 474 U.S. at 280 (Powell, J., dissenting) (quoting Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 147 (1970)).[2]

Petitioners submit the irreparable prejudice suffered by the State of New Mexico – caused by an eighteen year lapse of time between conviction and the Tenth Circuit's vacation of the conviction – is a suitable element to consider in a federal habeas corpus proceeding. This prejudice directly challenges the concept of finality. This Court has repeatedly espoused a sound judicial perspective about the finality of state court criminal convictions. *See McCleskey v. Zant*, 499 U.S. at 490-491; *Teague v. Lane*, 489 U.S. 288, 308-309 (1989); *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Kuhlmann v. Wilson*, 477 U.S. at 453 and n.16; *Reed v. Ross*, 468 U.S. 1, 10 (1984); *Engle v. Isaac*, 456 U.S. at 127. "At the very least, the Court should focus directly on the aspect of delay that increases the costliness of its remedy by allowing the State to show that it would be substantially prejudiced in its ability to retry respondent." *Vasquez*, 474 U.S. at 281 (Powell, J., dissenting).

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[2] "Witnesses die or move away, physical evidence is lost; memories fade. For these reasons, the Court has noted that 'The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary.' " *Peyton v. Rowe*, 391 U.S. at 62-63 (quoting *Rowe v. Peyton*, 383 F.2d 709, 715 (4th Cir. 1967)).

Petitioners urge this Court to grant review because the Tenth Circuit's decision "plainly undermines the State's interest in punishing the guilty, without either protecting the innocent or ensuring the fundamental fairness of the procedures pursuant to which one such as respondent is tried and convicted." *Vasquez*, 474 U.S. at 282 n.16. (Powell, J., dissenting). One of the many important factors in this federal habeas corpus proceeding is the State of New Mexico's compelling interest in the finality of Smith's 1978 criminal convictions for the first-degree murders of Leslie McDonnell and Cari Talton. This interest should be rightly balanced together with all other interests when federal habeas corpus relief is determined.

B. THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION TO MANDATE THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT EXERCISE DISCRETIONARY APPELLATE JURISDICTION FROM THE DENIAL OF FEDERAL HABEAS CORPUS RELIEF. THE TENTH CIRCUIT'S ACTS ARE CONTRARY TO THE LANGUAGE AND LEGISLATIVE INTENT OF 28 U.S.C. § 2253 (1994).

The second question seeks review by this Court of the procedural aspects of federal habeas corpus appellate review. Should the Tenth Circuit treat every appeal from the denial of federal habeas corpus relief as a mandatory direct appeal rather than exercise discretionary appellate review as required by 28 U.S.C. § 2253 (1994)? This Court has previously addressed procedural deficiencies relating

to federal habeas corpus review in the Tenth Circuit. *Garrison v. Patterson*, 391 U.S. 464 (1968). Petitioners submit this case also vividly demonstrates the need for this Court to scrutinize Tenth Circuit procedure in federal habeas corpus cases.

Contrary to 28 U.S.C. § 2253 (1994), no discretion is exercised by the Tenth Circuit. The procedure employed by the Tenth Circuit violates not only 28 U.S.C. § 2253 (1994) but also the clear legislative intent behind this federal statute. The Tenth Circuit conducts a comprehensive review and orders full briefing irrespective of whether or not a certificate of probable cause is denied by United States District Court for the District of New Mexico. The State of New Mexico cannot rely on the discretionary nature of a direct appeal as proclaimed in 28 U.S.C. § 2253 (1994) because the Tenth Circuit deliberately ignores this statutory provision.[3]

A certificate of probable cause should not be granted unless the petitioner, who is unsuccessful in district court, makes a substantial showing that he has been denied a federal right. Fed. R. App. P. 22; *Lozada v. Deeds*, 498 U.S. 430, 432 (1991). *Barefoot v. Estelle*, 463 U.S. at 892-893, reemphasizes the legislative intent of 28 U.S.C. § 2253 is to limit appeals from the denial of federal

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[3] The full briefing ordered by the Tenth Circuit burdens New Mexico's criminal justice system by diverting time and limited resources to repeated challenges of a state court conviction. "Federal habeas review creates friction between our state and federal courts, as state judges – however able and thorough – know that their judgments may be set aside by a single federal judge, years after it was entered and affirmed on direct appeal." *Kuhlmann v. Wilson*, 477 U.S. at 453 n.16.

habeas corpus relief.[4] The primary means of separating meritorious from frivolous appeals should be the decision to grant or deny a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253. *Id.*

The proper procedure and timing of the issuance of a certificate of probable cause has been addressed in *Garrison v. Patterson*, 391 U.S. at 466: "[W]e must ordinarily first issue a certificate of probable cause *before* the appeal can proceed. (Emphasis added)." *Nowakowski v. Maroney*, 386 U.S. 542, 543 (1967) states: "It is established law that a circuit judge or justice entertaining an application for a certificate should give 'weighty consideration' to its prior denial by a district judge." Rather than following this clear precedent, the Tenth Circuit gives no "weighty consideration" to the denial of a certificate of probable cause; no consideration is granted. In effect, the District Court's denial of a certificate of probable cause is an act of futility.

Rather than treating an appeal from the denial of federal habeas corpus relief as an appeal of right, the Tenth Circuit should give principled credence to the denial of the certificate of probable cause. In the alternative, the Tenth Circuit should initially review the record and either grant or deny the certificate *before* full briefing and oral argument as required in other federal circuit courts of appeal.[5]

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[4] "The purpose of this requirement of a certificate is to protect state authorities from having to respond to large numbers of frivolous habeas corpus appeals; they need respond only where a certificate has been issued." Charles Alan Wright, et al., *Federal Practice and Procedure: Jurisdiction* § 3968, at 408-409 (1977).

[5] *See, e.g., Guyer v. Beard*, 907 F.2d 1424, 1427 (3d Cir. 1990) (district court must first issue certificate of probable cause

The Tenth Circuit's act of reviewing the entire federal habeas corpus record and mandating full briefing before granting a certificate of probable cause smacks of the old adage, "Putting the cart before the horse."

CONCLUSION

Petitioners respectfully ask this Court to grant this Petition for Writ of Certiorari to review the United States Court of Appeals for the Tenth Circuit's decision granting a federal habeas corpus writ and vacating Smith's two 1978 first-degree murder convictions.

Respectfully submitted,

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before appeal can proceed); *Wilson v. O'Leary*, 895 F.2d 378, 381 (7th Cir. 1990) (certificate of probable cause is a condition of appellate court's jurisdiction). *See generally* Charles Alan Wright, et al., *Federal Practice and Procedure: Jurisdiction*, § 3968, at 410 and n.7 (1977): "But until the certificate is obtained, the appeal cannot go forward."

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

WILLIAM SMITH, Petitioner-Appellant, v. SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS; DERALD KERBY, Warden, Central New Mexico Correctional Facility, Respondents-Appellees.	)	No. 93-2218

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO
(D.C. No. CV 88-241)

(Filed Mar. 7, 1995)

Stephen P. McCue, Federal Public Defender, Albuquerque, New Mexico, For Petitioner-Appellant.

Margaret McLean (Tom Udall, Attorney General, with her on the brief), Assistant Attorney General, Santa Fe, New Mexico, for Respondents-Appellees.

Before **BRORBY, LOGAN** and **EBEL,** Circuit Judges.

BRORBY, Circuit Judge.

Petitioner-appellant William J. Smith appeals the district court's order denying his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Mr. Smith's primary basis for requesting relief from his two 1978 first degree murder convictions in New Mexico state court, and his corresponding consecutive life sentences, is the prosecution improperly withheld material exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. Our jurisdiction[1] arises under 28 U.S.C. § 1291.

I. BACKGROUND

A. *Preliminary Facts*[2]

During the afternoon of Friday, August 12, 1977, rancher Wayne Wallace found the bodies of two young

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[1] Although the district court's order denying Mr. Smith's petition for a writ of habeas corpus is a "final judgment" for purposes of 28 U.S.C. § 1291, the district court denied his request for a certificate of probable cause to appeal. *See* 28 U.S.C. § 2253. As we discuss below, the requirement that a habeas petitioner obtain a certificate of probable cause to appeal is a prerequisite to appellate jurisdiction; thus, the district court's refusal to grant a certificate of probable cause to appeal would limit our jurisdiction. Nonetheless, for reasons discussed in the body of this opinion, we conclude Mr. Smith has shown probable cause to appeal such that we will grant his request for a certificate of probable cause. *See id.* Accordingly, we have jurisdiction to consider this appeal.

[2] As is often the situation in many habeas corpus appeals, the sheer volume of the record, coupled with the factual complexity of the case and its age, makes our efforts to reconstruct

women in one of his corrals in rural Torrance County, New Mexico, near the small town of Mountainair. One of the bodies, later identified as that of Leslie McDonnell, was clothed in a yellow Budweiser T-shirt, jeans and no shoes. The other body, later identified as Cari Talton, a.k.a. Cari Newell,[3] was found naked. A pair of jeans, a green T-shirt with the word "Okies" on it, and a pair of

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what took place many years ago all the more difficult. The subsequent recitation of the background of this case should thus be understood in this light.

Pursuant to 28 U.S.C. § 2254(d), federal habeas courts must afford a presumption of correctness to a state court's findings of "basic, primary, or historical facts and the inferences that can properly be drawn regarding them." *Case v. Mondragon*, 887 F.2d 1388, 1393 (10th Cir. 1989) (citing, *inter alia*, *Marshall v. Lonberger*, 459 U.S. 422, 431-32 (1983)), *cert. denied*. 494 U.S. 1035 (1990); *see also Brecheen v. Reynolds*, 41 F.3d 1343, 1348 n.1 (10th Cir. 1994). "Thus, [factual findings] must be determined, in the first instance, by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts." *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam). As long as there is at least "fair support" in the record, a state court's findings of fact may not be disturbed by federal courts on habeas review. *See Marshall*, 459 U.S. at 432; *see also Sumner v. Mata*, 455 U.S. 591, 598 (1982) (presumption of correctness requires a "high measure of deference" by federal habeas courts).

[3] Cari Talton often used the last name of her boyfriend or common law husband "Randy" Newell. Quotation marks are placed around the name "Randy" because, as we discuss later, "Randy" Newell was actually Samuel Newell. In fact, there was a real Randy Newell, who was Samuel's brother. Samuel Newell allegedly used his brother's name because he wanted to conceal his true identity. This issue is discussed in greater detail in the body of this opinion.

tan boots and socks were found next to Ms. Talton's body; however, no underwear could be located.

Autopsies were performed the next day by Dr. J. Gauthier of the State Medical Examiner's Office. His examination of the partially decomposed bodies revealed Ms. McDonnell had been shot in the head by what could have been a shotgun, and Ms. Talton had been shot in the head and in the right side of her pelvis.[4] Based on his finding of shotgun pellets and wadding in the vicinity of both of Ms. Talton's wounds, Dr. Gauthier concluded she had been shot with a shotgun, although he could not determine whether the same shotgun inflicted both of her wounds. Nelson Welch, an expert for the prosecution, testified[5] although Ms. Talton had in fact been shot by a 12-gauge shotgun, he could not determine whether State's Exhibit 44, a 12-gauge shotgun belonging to Mr. Smith, was the gun actually used to shoot her. David Ramirez, a criminalistics expert, testified there were no workable prints on Exhibit 44, nor was there any indication the weapon had recently been cleaned. Dr. Gauthier was unable to determine the precise time of death due to the decomposition of the bodies. He did indicate, however, that the degree of decomposition of the bodies was

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[4] With respect to the pelvic gunshot wound on Ms. Talton's body, Dr. Gauthier characterized it as a contact shotgun wound near the groin area. He further observed that the wound was inflicted directly over a professional tattoo. He also indicated his belief that because of the unusual location of the wound, whoever inflicted it did so intentionally.

[5] All references to the "testimony" of individuals are to their testimony at the second trial in this case unless otherwise indicated. Mr. Smith's first trial ended in a mistrial.

consistent with the women having been dead for two to three days.[6]

Because the women's bodies were found within the geographical limits of Torrance County, the initial investigation was undertaken by the Torrance County Sheriff's Department and the New Mexico State Police. When it was subsequently learned the women were from Albuquerque, in Bernalillo County, the Albuquerque Police Department also became involved. Prior to the time when the decision was made to prosecute these cases in Bernalillo County, the cross-jurisdictional nature of these cases resulted in two different investigative tracks. The Bernalillo County investigation focused on Mr. Smith and some of his friends, while the Torrance County investigation targeted "Randy" Newell.

B. *The Results of the Bernalillo County Investigation*

Robert Hume had been living with Ms. McDonnell for about a year and a half at the time of her disappearance. He told authorities he first met Ms. Talton on Monday, August 8, 1977, when she and Ms. McDonnell arrived at the home of Mr. Hume and Ms. McDonnell. Mr. Hume indicated the two women stayed for an hour or so before they left to go out drinking and looking for drugs. The women went to a party that night at the home of one of Mr. Smith's friends, Rick Emmons. Ms. Talton, who

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[6] Entomologist Clifford Crawford testified that a maggot collected from Ms. McDonnell's body was at a stage of development consistent with having hatched approximately two and a half or three to eight days earlier.

was living with her common law husband "Randy" Newell, met Mr. Smith at the party and they had sexual intercourse numerous times that evening. At the same party, Ms. McDonnell met Billy Grubbs, Mr. Smith's roommate, and she ended up spending the night with him at Messrs. Smith and Grubbs' house. The next time Mr. Hume saw Ms. McDonnell was at 5:30 a.m. on Tuesday morning, when she returned home. Mr. Hume stated when Ms. McDonnell came home, she was crying and she asked him to hold her because she had used too much cannabinol, the active ingredient in marijuana, that night.

When Mr. Smith awoke on Tuesday morning, August 9, he discovered a gram of cannabinol, which was worth about $100, was missing from his stash of drugs. He testified he assumed Ms. Talton had taken it. At around 10:00 a.m., he drove his van to the residence of two of his friends, Harvey Bylsma and Ginger Donham. Mr. Smith wanted Mr. Bylsma's help in retrieving his pickup, which had been impounded. Mr. Smith also realized Mr. Bylsma's neighbor had a phone, and Mr. Smith had Mr. Bylsma call Mr. Smith's boss to let him know he would not be coming into work that day. Approximately half an hour later, Mr. Smith, along with Mr. Bylsma, Ms. Donham and her daughter April, left Ms. Donham's house and went to Ms. McDonnell and Mr. Hume's house to inquire about the missing cannabinol. Mr. Smith wanted Ms. McDonnell's assistance in finding out where Ms. Talton lived.

Both Mr. Hume and Mr. Smith testified Mr. Smith arrived at Mr. Hume's house around 10:30 a.m., accompanied by three other people. At that time, Mr. Smith told

Ms. McDonnell either she or her girlfriend (i.e., Ms. Talton) "ripped off" his drugs the night before. He stated he wanted Ms. McDonnell to take him over to Ms. Talton's house so he could talk to her because he did not think she, Ms. McDonnell, had taken the drugs. Ms. McDonnell agreed and voluntarily left her house with Mr. Smith and his companions.

When they arrived at Ms. Talton's house, she was on the couch, and she told them to come inside. Mr. Smith went in and spoke with Ms. Talton for a few minutes about the missing cannabinol while the others waited outside. Ms. Talton told Mr. Smith he had probably lost or misplaced the cannabinol at his house, and she suggested they go back to his house to look for it. Mr. Smith agreed, and they all went back to his house to look for the drugs. Ms. Donham's testimony confirmed this sequence of events.

While Mr. Smith was looking in his kitchen for the missing drugs, Ms. Talton came in with a bag containing about half a gram of cannabinol, proclaiming to have found the missing drugs. Mr. Smith, however, did not believe her and he accused her of having had the drugs all along. When he asked her where the other half a gram was, Ms. McDonnell stepped in and agreed to reimburse Mr. Smith for the missing half gram of cannabinol, which was worth approximately $50. Mr. Smith then took the remaining half gram and put it with the rest of his stash.[7]

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[7] Mr. Hume made a statement to the police that "he heard the girl or girls advise that they would pay back Bylsma, Grubbs, and Smith 'by Friday' (12 August)" for the missing half gram of cannabinol. Although Mr. Hume did not testify to this

Ms. Donham testified they all got back in Mr. Smith's van at around 11:30 that morning, which was the last time she saw Ms. Talton and Ms. McDonnell with Mr. Smith. Mr. Smith then dropped Ms. Donham off at her home.[8] Half an hour later, Messrs. Smith and Bylsma showed up at Ms. Donham's house for lunch, where they stayed until around 2:00 in the afternoon, at which time Mr. Smith, Ms. Donham, Mr. Bylsma, and April went to Kenneth LaDue's house. Mr. LaDue had sold Mr. Smith a 1950 purple Ford pickup truck, which had been impounded; however, the paperwork had never been transfered properly to Mr. Smith's name. Thus, before he could get his truck from Broadway Towing, where it was impounded, he needed to see Mr. LaDue.

Ms. Donham testified she spent the rest of Tuesday with Mr. Smith. Several other witnesses provided a detailed account of Mr. Smith's whereabouts on Tuesday, the day the prosecution claimed the murders were committed. From 2:30 until around 5:00 p.m., these witnesses stated Mr. Smith was either with Mr. LaDue or he was at Broadway Towing, trying to get his truck out of the

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fact at trial, this statement was admitted during Mr. Smith's post-trial evidentiary hearing.

[8] Mr. Smith's van, which the prosecution alleges was used by him in the commission of the crimes for which he was later charged, was searched by a Detective Lewis. Detective Lewis testified he found no blood, mud, dirt, or other evidence tending to show the van was somehow linked to these crimes, nor was there any evidence that the van had recently been cleaned. He did, however, find a cigarette case that Mr. Newell testified belonged to Cari Talton. The cigarette case, however, proves only that Ms. Talton was in the van, a fact not disputed by the defense.

impoundment lot. Finally, Ms. Donham testified Mr. Smith stayed at her house[9] for the remainder of the work week. She testified in some detail about what occurred on those days, and she indicated she never heard Mr. Smith leave the house during the night as she was a light sleeper and would have heard him moving around. Mr. Smith's employer Bill Gourly also provided Mr. Smith an alibi for the rest of the week as he testified Mr. Smith was at work during those days.

Randy Appert and his roommate Ralph Strom testified that around this time, Mr. Smith had come to consider their apartment as his own and he had his own key. Mr. Appert testified Mr. Smith came by the house on Saturday, August 13, and asked him if he could leave his gun at their house. Mr. Appert told him he did not know. Apparently, Mr. Smith left the gun there anyway because Mr. Appert testified the next time he saw the gun was when the police removed it from a closet in their house pursuant to a search warrant. Mr. Strom testified he did not know Mr. Smith had left the gun at their apartment either.

Nikki Thompson testified she was at the home of Messrs. Strom and Appert that Saturday morning when Mr. Smith showed up with a gun, similar in size to Exhibit 44, Mr. Smith's shotgun, in his hands in plain view. She further testified on direct examination she overheard a conversation between Messrs. Strom and Smith.

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[9] The fact that Mr. Smith was staying somewhere other than his own home was not that unusual. Due to problems with their landlord, Messrs. Smith and Grubbs had been planning to move out of their house anyway.

She testified she heard Mr. Smith say something like "he had been burned and the people had been punished," although she denied ever hearing Mr. Smith say he had recently used the gun. During an evidentiary hearing several years later, however, Ms. Thompson, then using her marital surname of Peters, admitted she had perjured herself. While she had heard Mr. Smith tell Mr. Strom he had been "burned," she admitted she never heard Mr. Smith say anything about having to punish, or having actually punished, anyone. She said she lied because she had been coerced to do so by Dana Smith, a good friend of Ms. McDonnell. Ms. Smith testified at trial that Ms. Thompson told her Mr. Smith said he had to punish two girls.

Mr. Strom testified that later on that Saturday, he went with Mr. Smith to buy some parts for Mr. Smith's truck, but they ran out of gas. The two men decided to go to a bar, at which time Mr. Strom recalled Mr. Smith mentioning someone, without using names, had "ripped off" some of his cannabinol.

"Randy" Newell was called as a witness for the prosecution. He testified he had been living with Ms. Talton as common law husband and wife at the time of her disappearance, and the last time he saw her was late in the afternoon on Monday, August 8. Although she was not home when he left for work the next morning, he could tell she had been home at some point that morning because when he came home for lunch, he noticed the clothes she had been wearing the night before were either on the floor or the bed.

Mr. Newell testified on direct examination about his relationship with Ms. Talton. He initially stated they got along "pretty good"; on cross-examination, however, he admitted she had not come home at night on at least two occasions, including Monday, August 8, and that this bothered him and made him unhappy. He also conceded they used to have "little arguments," and that one such argument resulted in Ms. Talton stabbing him with a knife. Mr. Newell also admitted both he and Ms. Talton were recovering heroin addicts and they would get up in the morning and go to a drug addiction program where they would receive oral methadone doses. Dr. Castillo, the clinical director of the program, testified Ms. Talton received her last dose of methadone sometime between 6:00 and 10:00 a.m. on Tuesday, August 9, 1977.

Determining the day and time of death was an important issue that received a significant amount of attention at trial. "Randy" Newell's testimony was central to the prosecution's case because he supported their theory that Mr. Smith killed the women on Tuesday.[10] The prosecution attempted to bolster the inference it wanted the jury to draw from Mr. Newell's testimony – that the women were killed on Tuesday – through the testimony of several other witnesses, including the aforementioned Clifford Crawford and Dr. Gauthier. Lois Chapman, Ms.

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[10] As the discussion above indicates, the testimony of Mr. Gourly, who was Mr. Smith's employer, and Ms. Donham, provided Mr. Smith with a relatively strong alibi for the remainder of the week. Thus, proof that the women were killed on Tuesday, presumably in the afternoon, was important because it was arguably the only day when Mr. Smith had the opportunity to kill the women.

McDonnell's grandmother, testified she and Ms. McDonnell's mother, Lois Strader, planned to meet Ms. McDonnell for lunch on Tuesday, August 9. Ms. Chapman further testified she spoke with Ms. McDonnell on Monday to finalize the arrangements, but she never showed up on Tuesday. When Ms. Chapman called her granddaughter at work, she was told she was not there. Ms. Chapman never heard from her granddaughter again. She claimed she and Ms. Strader looked for Ms. McDonnell for the rest of the week, but they, nor anyone else, had seen her.

The defense introduced its own evidence on the question as to the time of death in an attempt to discredit the prosecution's theory that the women were killed on Tuesday. Wayne Wallace, the rancher who found the bodies in his corral on Friday, August 12, testified he used to go to his corrals every other day. He stated when he had been out to this corral on Wednesday, August 10, he did not notice anything unusual. In addition, when he described how he found the women's bodies on Friday, he stated one of the bodies was clothed in a yellow T-shirt which stuck out "like a neon light." From this, Mr. Wallace deduced the bodies were not there on Wednesday because if they had been, he would have seen them.

Ruth Shockey testified she rented Ms. Talton and Mr. Newell a duplex apartment located in the back of her yard in July of 1977. Ms. Shockey's house had a window in the bedroom enabling her to see into the yard. After she was unsuccessful in several attempts to collect the rent from Ms. Talton and Mr. Newell, she initiated legal proceedings to have them evicted. The eviction papers were posted on the door to the apartment on Monday,

August 8. Ms. Shockey testified that between 3:00 and 4:00 p.m. the next day, she saw Ms. Talton and another blonde woman,[11] through her bedroom window, going into the apartment while they were crouched down. Ms. Shockey thought they were crouching down to hide from her. She then testified she never saw Ms. Talton again after that day. Moreover, although Mr. Newell testified he spoke to Ms. Shockey on Tuesday, Wednesday, Thursday, and Friday of that week to ask her if she had seen Ms. Talton, Ms. Shockey denied ever speaking to Mr. Newell until Friday, when Mr. Newell told her he had not seen Ms. Talton in four days and that he did not really care.

The defense also introduced the testimony of Walter Spruill, a retired member of the Navy. Spruill testified that sometime in early August of 1977, he and his mother were driving to the nearby town of Moriarty when they saw a young, blonde-haired woman walking on the side of the highway. His mother, a retired teacher, thought the woman may have been one of her former students. Mr. Spruill turned the car around and picked the woman up. He described her as blonde and rather thin. She rode in the car for twenty or so minutes until they dropped her off. Mr. Spruill then testified he saw this same woman on a Wednesday, about four to six days later, at the "Travelburger" drive-in. He specifically recognized her as the woman to whom he had given a ride a few days earlier. In court, he identified this woman as Ms. Talton from her picture. He also remembered the woman at the restaurant was wearing a bluish colored T-shirt with the word "Okies" on it and that she was with a heavier woman in a

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[11] It is undisputed Ms. McDonnell had blonde hair.

Budweiser T-shirt. He testified he saw the women for five to eight minutes, and he recalled giving them three cents when they were short of money for their food. He also testified he gave the thinner woman a book of matches after she had asked him for a match, and that he saw the women get into a grey two-door Pontiac automobile.

Finally, the defense called Alton Green, the owner of the "Travelburger" restaurant. His testimony essentially corroborated Mr. Spruill's testimony of what had transpired at the restaurant that Wednesday, which was August 10. He specifically remembered the two women because they, along with Mr. Spruill, were the only customers in the restaurant at that time. He also recalled both women were wearing T-shirts and Levi jeans.

C. *The Results of the Torrance County Investigation*

While the aforementioned evidence and testimony constituted the essence of the prosecution's case against Mr. Smith, he was not, at least at the outset, the only suspect being investigated in regard to these murders. Torrance County's law enforcement officials who were investigating this case had reason to, and did in fact, suspect "Randy" Newell may have been the perpetrator of these killings.[12]

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[12] The federal magistrate judge who issued a report and recommendation in May of 1993 on Mr. Smith's federal petition stated he had reviewed all the state court evidence in this case; in his own words, "Randy" Newell was not just a suspect, he "was the focus of the Torrence [sic] County investigation."

On August 18, 1977, at around 2:35 p.m., "Randy" Newell was driving his automobile near the scene where the bodies had been found when he collided with a semi tractor trailer. New Mexico Police Officer Donald Morrison was dispatched to the scene of the accident. Officer Morrison memorialized the following sequence of events in his report of August 19. Officer Morrison first asked Mr. Newell if he was injured, and Mr. Newell responded he was not. Officer Morrison then arrested Mr. Newell for driving while intoxicated, careless driving, and driving without a license. When Officer Morrison told Mr. Newell he was going to perform "a standard routine inventory" search of his car, however, Mr. Newell complained of various injuries and asked to be taken to a hospital. Officer Morrison further stated Mr. Newell asked either to be allowed to drive his car to the hospital or to have his car towed to the hospital. The first request was denied because the vehicle was not drivable due to extensive damage from the accident. His car remained at the scene so Officer Morrison could inventory its contents. Mr. Newell was then taken by ambulance to a hospital in Albuquerque.

During the inventory search of Mr. Newell's automobile, Officer Morrison found a white plastic bag on the rear passenger's side floorboard. His report stated: "[u]pon opening the white plastic bag, I found women's clothes that were damp and which smelled of mildew and had, what appeared to me, to have blood and hair on them. They were women's pants, blouses and panties." Officer Morrison found another plastic bag containing men's clothes with stains he characterized as "possibly blood." His report also disclosed Mr. Newell had been

stopped in this same area four days earlier, on Sunday, August 14, for reasons not disclosed in the record. At that time, the vehicle was searched by Officer Mark Kennedy pursuant to Newell's written consent. When Officer Kennedy requested permission to search the trunk, Mr. Newell informed him he did not have a key to the trunk.

Officer Morrison immediately advised Captain Frank Lucero, Sergeant Robert Gonzales, and Officer Mark Kennedy, members of the New Mexico State Police, of the existence of the clothes. Captain Lucero then told Officer Morrison to "relay these [items] to the Crime Laboratory next date, 08-19-77, to be compared with the evidence found at the scene of the homicide." Officer Morrison's report further indicated assistant district attorney Neil Mertz, the Albuquerque prosecutor assigned to handle the grand jury phase of the Talton-McDonnell homicides:

> was notified of the[se] findings and stated Mr. Newell had been a suspect due to him being involved in a fight with his wife, victim Carrie Newell, on a previous occasion. . . . Further, because Mr. Newell was found within the general vicinity where the two homicide victims, McDonnell and Newell, were found, he was considered a suspect.

Officer Morrison's report thus clearly stated "Randy" Newell was in fact a suspect in the Talton-McDonnell double homicide.[13] The report also contained a motive for

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[13] Under the section in the police report describing the nature of the incident, Officer Morrison wrote: "TRAFFIC ACCIDENT WITH POSSIBLE HOMICIDE EVIDENCE FOUND TO CASE #77-1408, VICTIMS CARRIE NEWELL AND LESLIE

"Randy" Newell to have murdered Ms. Talton,[14] namely, jealousy.

Later that same day, Officer Morrison prepared an affidavit in support of a search warrant for Mr. Newell's car. In the affidavit, he describes what he found during his inventory search of the car. He further stated he learned, from other officers, that Mr. Newell had previously been stabbed by Ms. Talton, a fact that "suppl[ied] [Newell] with a . . . motive for killing Carrie Newell." He further stated his belief that having found the clothes with possible traces of blood "makes it likely that these items are connected with the homicides and that other similar items and weapons may be found elsewhere in . . . the car Newell was driving." The subsequent search of the vehicle revealed no further evidence.

In accordance with Captain Lucero's directive, Officer Morrison then took the clothes recovered from Newell's car to Wayne Ferguson of the New Mexico State Police Crime Laboratory on August 19, 1977, for testing. Although Officer Ferguson tested a number of items recovered from the vehicle, he did not, for some unknown reason, test the women's clothing found in the white plastic bag. The men's clothing was tested, and it tested negative for blood; however, Ferguson admitted

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MC DONNELL." In another section entitled "VEHICLE STATUS," he noted: "POSSIBLE SUSPECT."

[14] The record does not disclose whether Mr. Newell had a specific motive for killing Ms. McDonnell. But this absence of a motive is equally applicable with respect to the prosecution's case against Mr. Smith since no motive for him to have killed Ms. McDonnell was ever advanced.

these tests might be inaccurate because the clothing had been stored in moist conditions contributing to the growth of mildew.

On October 3, 1977, Officer Ferguson turned over the untested items, including the women's clothing, to Officer Larry Michaelscheck of the Albuquerque Police Department, who in turn gave the items to Detective Laycock of the Albuquerque Police Department Criminalistics Laboratory. Detective Laycock, however, did not perform any tests on the women's clothes because he was instructed not to by a supervisor, Lieutenant Hubeny, for reasons again not apparent from the record. By the time of the evidentiary hearing in this case in 1983, this evidence had been destroyed, and thus, it was never tested to determine if it could somehow be linked to the Talton-McDonnell homicides.

At around the same time Officer Morrison arrested "Randy" Newell and found the clothing in his car, Sergeant Gonzales of the New Mexico State Police prepared a "Supplemental Report" regarding his investigation into the Talton-McDonnell homicides. His report, dated August 16, 1977, indicated he had contacted someone in the Albuquerque Police Department who told him "a Mrs. Pitchford had contacted him with some information regarding Kari Newell." Sergeant Gonzales' report indicates he then contacted Mrs. Pitchford himself and she told him, *inter alia*, that "Randall Newell was also known as Samuel J. Newell."

D. *The Indictment*

Although there was arguably some evidence tending to show "Randy" Newell may have been involved in the Talton-McDonnell homicides, there was also evidence tending to show Mr. Smith may have been involved. The prosecution exercised its prosecutorial discretion and elected to seek an indictment from the grand jury in Bernalillo County, New Mexico, against Mr. Smith.

On August 19, 1977, the grand jury returned an eight-count indictment charging William J. Smith with two counts of kidnapping and two counts of first degree murder for the deaths of Cari Talton and Leslie McDonnell. The remaining counts of the indictment charged Mr. Grubbs with two counts of being an accessory to kidnapping and two counts of being an accessory to first degree murder. Mr. Bylsma and Ms. Donham were also indicted for the murder of Ms. Talton and Ms. McDonnell. Prior to trial, the prosecution entered a *nolle prosequi* with respect to the charges against Mr. Grubbs due to insufficient evidence. Thereafter, the charges against Ms. Donham were also dismissed, although it is unclear whether the prosecution entered a *nolle prosequi* as to her or whether the court dismissed the indictment against her. In any event, she was not required to stand trial, and the case proceeded against only Mr. Smith and Mr. Bylsma.

E. *Trial Proceedings*

After assistant district attorney Mertz handled the grand jury phase of the case, it was assigned to Peter McDevitt for purposes of trial. Mr. McDevitt later recused

himself because he knew some of the parties involved in the case, and it was reassigned to assistant district attorney Roy Anuskewicz, Jr., who was assisted by Virginia Ferrara.

The prosecution's theory was Mr. Smith killed Ms. Talton and Ms. McDonnell on Tuesday, August 9, out of revenge for Ms. Talton having stolen some of Mr. Smith's cannabinol.[15] The motive for Ms. McDonnell's killing is more troubling, especially in light of the [sic] Mr. Smith's own testimony that he did not believe she had taken the drugs. This statement, coupled with Ms. McDonnell's agreement to reimburse Mr. Smith for the missing half gram, raises a question over the motive for Ms. McDonnell's killing. The prosecution's theory may simply have been that Ms. McDonnell was in the van with Mr. Smith and Ms. Talton when Mr. Smith killed Ms. Talton, and that Mr. Smith had to kill Ms. McDonnell because she witnessed Ms. Talton's killing and she could have identified Mr. Smith as the perpetrator.

Timing was central to the prosecution's case. As previously indicated, it was essential for the prosecution to establish the women were killed on Tuesday, August 9, an important fact that did not escape the attention of the prosecution. In her opening statement, Ms. Ferrara asked the jury "to pay special attention" to the evidence regarding the day and time of death, evidence she called "very important." As a practical matter, the prosecution had to

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[15] Although it was never firmly established that Ms. Talton had in fact stolen Mr. Smith's cannabinol, the record is clear Mr. Smith *thought* Ms. Talton had stolen it, thereby supplying him with a motive for the killing.

establish Tuesday as the day the women were killed in order to convict Mr. Smith because the testimony of Ms. Donham, coupled with the testimony of Mr. Smith's employer Bill Gourly, gave Mr. Smith a relatively strong alibi defense by accounting for Mr. Smith's whereabouts for the rest of the second week of August 1977. Thus, the prosecution had to prove the women were killed on Tuesday in order to show Mr. Smith had the opportunity to commit these crimes.

Mr. Smith was initially represented by Anthony Lucero Jr., and one week prior to trial, the court ordered Mr. Lucero to obtain additional counsel to assist him at trial because he had been indicted in federal court. Mr. Lucero retained the services of Warren Harris. On August 22, 1977, prior to the trial in this case, Mr. Lucero filed a motion for discovery pursuant to the New Mexico Rules of Criminal Procedure. The motion sought, *inter alia*, "[p]olice reports of whatever kind of nature, whether initial or supplemental, relating to investigation or inquiring into circumstances surrounding these criminal complaints." Eight days later, the trial court signed an order stating:

> That the Defendant, WILLIAM SMITH, should be, [and is] hereby ordered to be given Discovery, pursuant to Rule 27 of the Rules of Criminal Procedure, by the District Attorney's office, for the Second Judicial District, [who] shall disclose all police reports, records, papers, documents, photographs, or other tangible objects or copies thereof, including scientific experiments made in connection with this case, immediately, and shall continue to provide the

> copies to the defense counsel during the pendency of this action.

Notwithstanding this order to disclose, the prosecution never divulged the police reports prepared by Officer Morrison and Sergeant Gonzales, both of which contained relevant information relating to "Randy" Newell's possible involvement in this case.

The trial commenced on October 11, 1977. Mr. Smith's defense at trial was alibi and insufficient proof to implicate him in these crimes. On October 17, 1977, the trial court declared a mistrial due to the jurors' inability to reach a unanimous verdict.

In November 1977, prior to Mr. Smith's January 30, 1978 retrial[16] Mr. Lucero withdrew from the case because of a dispute as to his use of the retained funds in preparing Mr. Smith's defense. As a result, Mr. Harris represented Mr. Smith by himself during the retrial. Prior to the start of the retrial, Harris, who had prepared a written motion seeking disclosure of the arrest and conviction records of three witnesses for the prosecution, Mr. Hume, Ms. Thompson, and "Randy" Newell, filed that motion in open court.[17] The court made a handwritten ruling on the motion, which stated: "Filed in open court on 1/31/78. . . . Denied as to arrests – previously defendant

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[16] The prosecution opted only to retry Mr. Smith and did not retry Mr. Bylsma. The reasons for this decision are not clear from the record.

[17] Mr. Lucero's motion for the police reports, which was filed prior to the commencement of the first trial, also requested records of prior convictions of any individual to be called as a witness for the prosecution.

previous told by D.A. no convictions as to any of these [signed] Cole D.J." The court's order, which is somewhat illegible,[18] was made in reliance on a representation to the court made by Mr. Anuskewicz that "Randy" Newell had no prior convictions. Mr. Anuskewicz later testified he based this representation on the absence of a rap sheet on Newell in the file and Ms. Ferrara's failure to tell him anything about Mr. Newell having a record.

During his retrial, Mr. Smith maintained the same defenses he asserted at his first trial. By this time, the prosecution was on notice of the essence of Mr. Smith's defenses, which were alibi coupled with what was characterized in his opening statement as proof that the prosecution's evidence strongly suggested "someone else" had as much of a reason, if not more of a reason, to have committed these crimes. Mr. Harris did not refer to this other person by name, but it was obvious he was insinuating it was "Randy" Newell.

On February 4, 1978, the jury returned a verdict acquitting Mr. Smith on the kidnapping counts but convicting him on both counts of first degree murder. At around this time, "Randy" Newell had moved into a house with Celia Payne and Mark Hopkins. On March 5, 1978, four days before Mr. Smith was to be sentenced, Newell was found lying on the floor of their house, with

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[18] Although the judge's handwritten notation is somewhat illegible, our understanding of the court's ruling appears to be accurate in all material respects. Moreover, the State's acquiescence in this understanding of the court's ruling demonstrates its good faith willingness to acknowledge that this is a fair statement of the court's ruling.

needle marks in his arms. The medical examiner's office later determined Newell had died from a drug overdose.[19]

On March 9, 1978, the trial judge sentenced Mr. Smith to two consecutive terms of life imprisonment. Mr. Smith, with Mr. Harris' assistance, filed a notice of appeal in the state supreme court[20] on March 20, 1978, asserting fourteen claims of error. On February 27, 1979, the New Mexico Supreme Court affirmed Mr. Smith's convictions. *See Smith v. State*, 591 P.2d 664 (N.M. 1979). The mandate was issued on March 16, 1979.

F. *State Court Evidentiary Hearing*

On September 27, 1982, Mr. Smith, through new counsel Alice Hector, filed a motion in the New Mexico

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[19] Ms. Payne and Mr. Hopkins both testified at the evidentiary hearing in 1983 that "Randy" Newell had made statements to them while he was living with them admitting to his involvement in the Talton-McDonnell homicides. Ms. Payne testified at the evidentiary hearing that Mr. Newell had told her he killed Ms. Talton out of jealousy; both Ms. Payne and Mr. Hopkins testified Mr. Newell once threatened to kill Ms. Payne as he had "the other two girls." In addition, Donna Nargelovic, one of Mr. Newell's coworkers, testified Mr. Newell had made a statement to her that Mr. Talton was killed because of jealousy.

[20] New Mexico has a two-tiered appellate court system, and in the ordinary case, a direct appeal would lie to the state court of appeals with the power of discretionary review resting with the state supreme court. The New Mexico Constitution, however, mandates that an appeal from a judgment in a criminal case imposing a sentence of death or life imprisonment "shall be taken directly to the supreme court." N.M. Const. art. VI, § 2. Thus, the notice of appeal was properly filed in the state supreme court.

Supreme Court seeking a recall of the mandate, a withdrawal of the opinion and reconsideration on the merits. This request was prompted by the Supreme Court's refusal to address two of Mr. Smith's claims of error in his direct appeal because Harris, his counsel, failed to provide the appellate court with the necessary transcripts, thereby resulting in a waiver of those issues.[21] *See Smith*, 591 P.2d at 667-68. The Supreme Court denied the motion on October 8, 1982.

Mr. Smith's counsel continued to investigate this case, presumably in anticipation of filing a motion for post-conviction relief. In the latter part of 1982 and into early 1983, Mr. Smith's counsel's investigation revealed the prosecution may have failed to disclose several pieces of evidence, all of which related to Mr. Smith's defense that someone else – "Randy" Newell – committed these crimes. The specific evidence in question was the clothing taken from "Randy" Newell's car, the police reports indicating Mr. Newell's status as a suspect in the Torrance County investigation, Mr. Newell's presence on two separate occasions near the location where the bodies were found, and Mr. Newell's use of "Randy" Newell as an alias for his true name, Samuel J. Newell; the prior conviction record of Samuel J. Newell and his status as a

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[21] Warren Harris' misconduct in handling Mr. Smith's trial and appeal resulted in disciplinary proceedings, and ultimately the imposition of sanctions, against him. Moreover, he was later subjected to a public censure for his failure to respond to repeated inquiries from the Disciplinary Board relating to the investigation into his handling of this case. *See Matter of Harris*, 680 P.2d 602, 602 (N.M. 1984). He was temporarily suspended from the practice of law.

fugitive with an outstanding arrest warrant from the State of Kansas; several statements Mr. Newell made to law enforcement personnel; Mr. Newell's ownership of a shotgun; and allegedly exculpatory statements by an individual named Linda "Crickett" Nelson.[22]

There were apparently only two specific discovery requests made by Mr. Smith's trial counsel, both of which were granted by the trial court: one for the police reports, and one for prior arrests and convictions of the prosecution's witnesses, including "Randy" Newell.[23] Although there are conflicting statements in the various pleadings in this case, it does not appear defense counsel ever made

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[22] While we address each of these arguments separately, we note the State argued, and Mr. Smith's counsel candidly acknowledged, that the last two pieces of evidence – Mr. Newell's ownership of a gun similar to the one allegedly used to commit these crimes and the statements or Ms. Nelson – were not raised in the briefs before the district court and therefore should not be considered on appeal. We agree these issues were not presented to the district court in the first instance, and that in the absence of extraordinary circumstances to the contrary, we will not consider such issues for the first time on appeal. *See, e.g., Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("[i]t is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 720-22 (10th Cir. 1993) (discussing the policies behind this rule). In this case, because we believe consideration of these two issues would not alter or affect our conclusion, we adhere to the general rule and do not consider these claims for the first time on appeal.

[23] In fact, there were two specific requests for conviction records of State's witnesses. Mr. Lucero filed one such motion prior to the first trial and Mr. Harris filed one prior to the second trial.

a catchall motion with a general request for the production of "any exculpatory material." Regardless of whether such a motion was made, there was never a court order to that effect. While the significance of failing to make such a request is discussed below, it is apparent that had the prosecution responded to the specific requests which were made, namely, the police reports, the contents of those reports would certainly have alerted defense counsel to the existence of the potentially exculpatory information regarding "Randy" Newell.

On April 4, 1983, Ms. Hector, relying on the information she learned, filed a motion for post-conviction relief, also referred to as a Rule 57 motion,[24] raising *Brady* claims based on the prosecution's alleged failure to disclose exculpatory evidence, along with claims of ineffective assistance of trial and appellate counsel relating to Mr. Harris' handling of the trial and direct appeal. She attached an affidavit to the motion attesting to her investigative efforts and proffering a summary of the evidence

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[24] Throughout the pleadings, this motion is referred to by several names, the most frequent of which is the "Rule 57" motion. Although the State of New Mexico has long since amended its rules of procedure and the names accorded to particular post-trial motions, it appears that a Rule 57 motion was similar to either a motion to vacate, set aside or correct a sentence or a motion for a new trial based on newly discovered evidence. *See State v. Peppers*, 796 P.2d 614, 617 (N.M. Ct. App. 1990) (discussing the precursor and successor rules to Rule 57). In addition to Rule 57 motions, a criminal defendant could also seek recourse by filing a state petition for a writ of habeas corpus. *See id.* at 616-18. This motion was in essence a petition in state court seeking relief from a conviction due to constitutional error.

she intended to prove in support of these claims. The same judge who presided over Mr. Smith's trial granted Mr. Smith's request for an evidentiary hearing on these issues. A comprehensive, but fragmented, evidentiary hearing was subsequently held whereby Mr. Smith presented his evidence during five days in July, August and September of 1983, and the State presented its case during two days in December of 1983. There was a significant amount of testimony adduced at this hearing. Mr. Smith called numerous witnesses, including the two prosecutors who handled his trial and many of the law enforcement personnel involved in the investigation of the Talton-McDonnell homicides.

Mr. Smith's first witness was lead prosecutor Roy Anuskewicz. When asked about Officer Morrison's report detailing several pieces of information regarding "Randy" Newell, including his status as a suspect, that he was seen in the area where the bodies were found on two occasions, and that the clothes were taken from his car, Mr. Anuskewicz stated he could not recall if the report had been disclosed or if it was in fact in Mr. Smith's file at that time. He further stated the Bernalillo County district attorney's office had in place an "open file" policy, whereby defense counsel could review a prosecutor's entire file upon request. Mr. Anuskewicz testified:

> I didn't go through [the file], mull through it, and say "Oh, this is exculpatory, this isn't." You know, if we have a police report in the file, we have a search warrant, we – whatever it may be, you know, its an open file. They can come in and see it; you know, it solves some of the – so you – you know, I, I was – I hate making those decisions, you know, its [sic] a difficult question.

Ms. Ferrara acknowledged Officer Morrison's report and Sergeant Gonzales' report, regarding "Randy" Newell being known as Samuel J. Newell, were never disclosed to Mr. Smith's counsel. Doug Henson, counsel for the State during this hearing, stipulated Officer Morrison's report was not in the Smith file while he was preparing for this hearing, although he did not comment on whether it was in the file at the time of trial several years earlier. Mr. Harris testified he never received Officer Morrison's report and he was unaware of the contents of the report relating to "Randy" Newell's true identity. Mr. Harris' testimony is reinforced by the conspicuous absence of any cross-examination of Mr. Newell at trial about the material contained in Officer Morrison's report.

With respect to the clothes seized from Mr. Newell's car, Ms. Ferrara, a relatively inexperienced felony trial prosecutor at the time of Mr. Smith's trial in 1978, testified she recalled examining the bag of women's clothing taken from Mr. Newell's car in the evidence room at the Albuquerque Police Department with Mr. Anuskewicz prior to the first trial. She stated she did not believe she ever discussed the existence of these clothes with defense counsel, although she did indicate all the evidence from Newell's car was in the evidence room and it was marked with a tag stating "Articles from vehicle accident," albeit with no mention of, or connection to, "Randy" Newell.

She remembered a pair of women's underwear was seized from Mr. Newell's car. She recalled it being stained on the right front side with several spots she thought were blood. Prior to trial, she spoke with Newell about the blood stains, and he told her the stains were menstrual blood as Ms. Talton had been menstruating at that

time. Ms. Ferrara testified she did not believe the stains were menstrual blood, primarily because they were situated on the right front portion of the underwear, rather than in the area where menstrual blood would ordinarily be found. Furthermore, the gunshot wound to Ms. Talton's pelvis was on her right side, the same side as the stains found on the underwear. In addition, Celia Payne, the woman with whom "Randy" Newell was living at the time he died, later testified Mr. Newell had bragged to her that the police stupidly believed his explanation that the stains were menstrual blood.

Ms. Ferrara next testified she thought it might be "helpful" to have the underwear examined in case it was introduced at trial in order to have a medical evaluation of whether the stains were in fact blood, and if so, whose blood it was. She recalled being "curious" about the stains, and she asked someone whether tests of the underwear were necessary. She said she was told not to worry about having the underwear tested since it was probably the same substance on the man's clothing which had been tested and which was found not to be blood. She acknowledged no tests were ever done on the underwear and that it, along with the rest of the clothes, was destroyed before any further testing could be performed.

Ms. Ferrara admitted she did not realize at the time of trial that she had authority to order the police department to test the clothing. In hindsight, however, she acknowledged she did in fact possess such authority, although she still did not think "that was her role in this whole case, to have that done." There was additional testimony that at the time of trial, scientific testing was

available to differentiate between menstrual and non-menstrual blood.

Mr. Harris testified he was never informed of the existence of these clothes, and if he had been so advised, he would certainly have investigated this issue in more detail by interviewing Officer Ferguson and others who had seen the clothes as well as contacting an independent expert if necessary. He testified this information would have made a "tremendous" difference in his trial preparation strategy.

Another critical issue at the evidentiary hearing surrounded the true identity of "Randy" Newell and whether and when the prosecution knew about his true identity. In fact, "Randy" Newell's real name was Samuel J. Newell. While he was living in New Mexico, he used the name "Randy," his brother's name, in an effort to conceal his real identity. Samuel J. Newell used the name "Randy" as an alias because he was a fugitive for whom an arrest warrant had been issued on August 14, 1974, by the authorities in Sedgwick County, Kansas. The warrant was based on Samuel J. Newell's failure to complete a drug addiction program and for his unauthorized leave from the treatment facility. In addition to being a fugitive, it was subsequently learned Samuel J. Newell was a twice-convicted felon, having pled guilty to two separate counts of burglary in Kansas in December of 1972 and March of 1973.

Whether the prosecution knew "Randy" Newell was actually Samuel J. Newell, and if so, when they obtained this knowledge, were hotly contested issues during this evidentiary hearing. In an effort to show the prosecution

knew prior to the end of the retrial, Mr. Smith relied on Sergeant Gonzales' police report, dated August 16, 1977, in which he stated a Mrs. Pitchford indicated that "Randall Newell was also known as Samuel J. Newell." Mr. Smith also introduced the testimony of Detective Archie Borunda of the Albuquerque Police Department who stated he told the prosecution that "Randy" Newell was actually Samuel J. Newell. Detective Borunda testified once he learned this information, he obtained a rap sheet on Samuel J. Newell. The rap sheet indicated the prior convictions discussed above, and Detective Borunda stated he gave a copy of that rap sheet to the prosecution. As for the timing of when this information was allegedly conveyed to the prosecution, Detective Borunda stated, "I don't know how early in the investigation it became known that Randy Newell was actually Samuel Newell, but it was during one of the trials that it was known. In fact, it was in the reports that that was his real name."[25] Detective Borunda later reiterated he could not remember precisely when this information was given to the prosecution; however, he was certain it was during one of Mr. Smith's trials and before the end of the retrial.

In addition to the two prior convictions for burglary as Samuel J. Newell, Ms. Ferrara's trial preparation notes reflect "Randy" Newell stated he had "completed 2 yrs + 2 yrs probation" for "Poss/Sales of MDA (Wichita)" in 1972. Preceding this information, Ms. Ferrara had written the word "Felonies." When she was asked about this

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[25] The "reports" Detective Borunda was referring to was actually Sergeant Gonzales' report containing the statement of Ms. Pitchford.

notation at the evidentiary hearing, Ms. Ferrara admitted this information had not been disclosed to the defense but stated the reason for not disclosing it was because it could not be verified. She was, in other words, unable to determine if "Randy" Newell had actually been convicted of such a crime. Ms. Ferrara stated that based on this lack of verification, she assumed it was merely an arrest and not a conviction, although she recognized it was a bit unusual for someone not to know if they had been convicted of a crime in the past. Without ever following up on this issue, Mr. Anuskewicz represented to the trial court that "Randy" Newell had no prior convictions with respect to the defense's motion for disclosure of conviction records.

Mr. Anuskewicz testified he did not know "Randy" Newell's true name was Samuel J. Newell; however, he also said he was familiar with the entire file in this case, which presumably would have included Sergeant Gonzales' report regarding Ms. Pitchford's statement, which he was "sure" he had read in preparation for trial.

Mr. Harris testified he was never informed "Randy" Newell was actually Samuel J. Newell, even though the court had ordered the prosecution to disclose, *inter alia*, police reports in this case. Moreover, because Harris never learned of Newell's true identity, he stated he did not know about his fugitive status or his prior convictions either.

Yet another important issue at this hearing involved four statements "Randy" Newell made to Sheriff Chavez, Sergeant Gonzales, Detective Borunda and an employee of the Medical Examiner's Office. The prosecution had

knowledge of these statements, as Ms. Ferrara's pretrial notes regarding "Randy" Newell specifically noted he had given a tape recorded statement to Sheriff Chavez, as well as statements to Detective Borunda, and to someone in the Medical Examiner's Office. Mr. Newell's statement to Sergeant Gonzales was referenced in a supplemental report prepared by Sergeant Gonzales on September 15, 1977. While the precise contents of each of these statements has never been specifically identified, several excerpts from them were known, including "Randy" Newell's statement to Sergeant Gonzales that the blood on the women's underwear was menstrual blood.

Mr. Anuskewicz testified he did not recall ever turning over a copy of any of these statements to defense counsel. He also did not recall ever seeing a transcription of the tape recorded statement given to Sheriff Chavez. Mr. Anuskewicz referred to a letter sent by Mr. McDevitt to Mr. Lucero, dated October 3, 1977, which advised Mr. Lucero of the district attorney's open file policy. The letter further indicated Sheriff Chavez had taken a tape recorded statement from "Randy" Newell. It indicated that the statement had not been provided to the prosecution and if the defense wanted the statement, it should obtain it by subpoena.

Mr. Harris testified he was never advised of the existence of these statements, which he indicated would have been useful for both investigative and impeachment purposes. As to the former, if Harris had been apprised of the existence of these statements, specifically the statement by Mr. Newell to Sergeant Gonzales as to the blood on the clothing being menstrual blood, this would have raised a red flag in his mind and alerted him to the

existence of the clothes taken from Mr. Newell's car. As to the latter, attorney Ray Twohig testified as to the importance to attorneys of having witness statements prior to trial because of the value such statements serve in attempting to impeach a witness by highlighting the discrepancies among the statements.

On February 24, 1984, after all the evidence had been received, the state trial court issued its thirteen-page opinion detailing its findings of fact and conclusions of law.[26] The court considered Mr. Smith's evidence but concluded he had not shown any improper conduct by the prosecution nor had he demonstrated any entitlement to relief. The gravamen of the state court's findings was Mr. Smith or his attorneys had actual knowledge of some of this information and it was therefore not withheld; that all of the alleged *Brady* evidence was made available to defense counsel by way of the prosecution's "open file" policy, but that in any event, the evidence was not exculpatory; and that Harris provided Mr. Smith with competent representation.

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[26] While the statutory presumption of correctness requires us to defer to the state court's underlying findings of fact, Mr. Smith's *Brady* claims and his ineffective assistance claims both involve mixed questions of law and fact subject to *de novo* review. *See Strickland v. Washington*, 466 U.S. 668, 698 (1984) (ineffective assistance claims); *Bowen v. Maynard*, 799 F.2d 593, 610 (10th Cir.) (*Brady* claims), *cert. denied*, 479 U.S. 962 (1986). Therefore, the state trial court's ultimate conclusions of law are not binding on us.

G. *Subsequent State Court Proceedings*

Undeterred, Ms. Hector then sought a state petition for a writ of habeas corpus by filing a civil action on May 29, 1984, against the warden, the person with "custody" over Mr. Smith. In his petition, Mr. Smith claimed he "was denied a fair trial and [he was] being illegally detained in violation of his constitutional right to a fair trial and due process of law." He also requested another evidentiary hearing.

The State responded to the court's order to show cause by filing a motion to preclude an evidentiary hearing and to dismiss the petition. The basis for the former motion, as set forth in the State's brief in support thereof, was Mr. Smith had already received a full and fair hearing on the identical issues at his Rule 57 hearing. The State conceded this was an issue of first impression in New Mexico but argued the court nonetheless should deny what was in essence a duplicative hearing on the same claims. On February 5, 1985, a different state trial judge denied the State's motion and was fully prepared to proceed with the hearing.

That same day, however, the State sought to challenge this ruling by filing an original proceeding in the New Mexico Supreme Court seeking a writ of prohibition. The New Mexico Supreme Court temporarily enjoined the state trial court from proceeding with this hearing in order to allow briefing and argument. On October 28, 1985, the New Mexico Supreme Court agreed with the State's position and held the state trial court was "without jurisdiction to grant an evidentiary hearing in the instant case." *State ex rel. Sullivan v. Kaufman*, 708 P.2d

322, 325 (N.M. 1985). Accordingly, it granted a permanent writ of prohibition against the state trial judge preventing him from holding another evidentiary hearing as to the claims for which the Rule 57 hearing was held. *Id.* The mandate was issued on November 12, 1985.

While this order resolved the question of Mr. Smith's right to a hearing, it did not deal with the merits. It was not until April 10, 1987, that yet another state trial judge summarily dismissed Mr. Smith's state petition for a writ of habeas corpus on the merits. Discretionary review of the ruling on the merits was sought in the New Mexico Supreme Court on May 11, 1987, but the court denied review nine days later.

H. *Federal Habeas Corpus Review by the District Court*

On March 3, 1988, attorneys Alice Hector and Lewis Fleishman filed a petition on behalf of Mr. Smith in federal district court in New Mexico seeking a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. In his petition, Mr. Smith reasserted his *Brady* claim and his ineffective assistance of trial counsel claim. He also filed a motion requesting an evidentiary hearing on his ineffective assistance of *appellate* counsel claim, contending the record was inadequately developed to permit meaningful review of this claim. The matter was referred to a magistrate judge who determined the claims in Mr. Smith's petition were in fact exhausted and were not amenable to summary disposition. The court then established a briefing schedule for the merits of the claims raised in the petition.

On May 24, 1993, the magistrate judge issued a thirteen-page report and recommendation, making findings similar to those made by the state trial court after its Rule 57 post-conviction hearing. Specifically, the magistrate judge found, with respect to the *Brady* claims, although there may have been evidence that *law enforcement* knew "Randy" Newell was actually Samuel Newell, "[t]here is no indication that the *prosecutors* were aware of Newell's true identity." (Emphasis added.) The court then found "there is no indication the State *knowingly* failed to disclose information" (emphasis added), or that the prosecution "*intentionally* kept [evidence] from him" (emphasis added). The court also stated "[s]imply because one county's investigation disclosed certain information, it does [not][27] follow that this information can be imputed to a different county's investigation since both counties are under the umbrella of the State of New Mexico." Stated alternatively, the magistrate judge concluded the "Bernalillo County investigation superseded the preliminary one of Torrence [sic] County." In addition, to the extent any of the evidence regarding "Randy" Newell being Samuel Newell was exculpatory, the court concluded it would only have been probative for impeachment purposes and it would have merely been cumulative. As for the ineffective assistance of trial counsel claim, the court concluded Mr. Harris' representation at trial was not ineffective because it was the product of thorough investigation, it involved effective examination

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[27] It is clear from the context of the magistrate judge's report and recommendation that the word "not" was inadvertently omitted.

of witnesses and legitimate tactical decisions. Finally, the court summarily denied Mr. Smith's request for an evidentiary hearing on the ineffective assistance of appellate counsel claim, concluding Mr. Smith failed to carry his burden of demonstrating a hearing was warranted.

Mr. Smith then filed timely objections to the magistrate judge's report and recommendation pursuant to 28 U.S.C. § 636(b) (1), taking issue primarily with the magistrate judge's disposition of the *Brady* claims. The district court explicitly stated it conducted a *de novo* review of those portions of the record to which an objection was raised, a statement we accept at face value. *See Andrews v. Deland*, 943 F.2d 1162, 1171 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992). The district court, however, overruled Mr. Smith's objections, adopted the magistrate judge's recommendation, and dismissed the petition with prejudice. Because Mr. Smith objected to the report and recommendation, he preserved his right to renew his objections on appeal. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

I. *Procedural Issues on Appeal*

Mr. Smith, once again represented by new counsel, assistant federal public defender Stephen P. McCue, filed a timely notice of appeal challenging the district court's adverse ruling denying his petition for relief. Before turning to the merits of Mr. Smith's claims, however, we must address two threshold procedural issues. The first involves a jurisdictional matter regarding the availability

of a certificate of probable cause to appeal, and the second relates to the procedural prerequisites for federal habeas corpus review.

1. Certificate of Probable Cause

28 U.S.C. § 2253 provides, in relevant part, "[a]n appeal [of an order denying a petition for a writ of habeas corpus] may not be taken to the court of appeals. . . unless the . . . judge who rendered the order or a circuit justice or judge issues a certificate of probable cause." The district court declined to issue a certificate of probable cause to appeal, finding "no substantial issue of law for review." Because "[t]he statutory certificate of probable cause is a jurisdictional prerequisite to appeals from final orders in habeas corpus proceedings," *Ramsey v. Hand*, 309 F.2d 947, 948 (10th Cir. 1962) (per curiam),[28] *cert. denied*, 373 U.S. 940 (1963), we must determine whether Mr. Smith has in fact made the requisite showing of an entitlement to a certificate of probable cause to appeal. If he has, then we are authorized under § 2253 to issue a certificate of probable cause to appeal, and upon

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[28] *See* Fed. R. App. P. 22(b) ("In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court [i.e., pursuant to 28 U.S.C. § 2254], an appeal by the applicant for the writ *may not proceed unless* a district or a circuit judge issues a certificate of probable cause . . . . If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge.") (emphasis added).

its issuance, petitioner "must then be afforded an opportunity to address the underlying merits." *Garrison v. Patterson*, 391 U.S. 464, 466 (1968) (per curiam); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). If, however, there has not been a sufficient showing of an entitlement to a certificate of probable cause to appeal, then we are without jurisdiction to consider this appeal. *See Ramsey*, 309 F.2d at 948.

There is no automatic right to appeal a district court's order denying federal habeas corpus relief. By enacting § 2253, Congress authorized a conditional right to appeal, conditioned on the habeas petitioner first obtaining a certificate of probable cause. *See* 28 U.S.C. § 2253. This requirement furthers the salutary purpose of weeding out frivolous appeals, *see Barefoot*, 463 U.S. at 892-93 (the "primary means of separating meritorious from frivolous [habeas corpus] appeals should be the decision to grant or withhold a certificate of probable cause"), by placing the burden on the habeas petitioner to make a threshold showing that the issues sought to be raised on appeal are at least arguably meritorious. *See id.*

In *Gallagher v. Hannigan*, 24 F.3d 68 (10th Cir. 1994), we discussed the criteria courts should look to in evaluating whether a certificate of probable cause is warranted. In general, a habeas petitioner who fails to obtain relief in the district court should be permitted to appeal that disposition only upon a "substantial showing of the denial of an important federal right by demonstrating that the issues raised are debatable among jurists, that a court could resolve the issues differently, or that the questions deserve further proceedings." *Id.* at 68 (citing *Barefoot*, 463 U.S. at 893 & n.4).

In the present case, we believe the briefs demonstrate Mr. Smith has carried this threshold burden by making a satisfactory showing that the issues he seeks to raise are arguably meritorious and that they warrant further proceedings. Moreover, given the purpose of the requirement that a petitioner obtain a certificate of probable cause to appeal, we do not find that the claims are frivolous such that Mr. Smith should be denied appellate review of the district court's order denying his petition. Therefore, we grant his request for a certificate of probable cause to appeal.

2. Exhaustion

Having thus concluded we have jurisdiction over Mr. Smith's appeal, we next address whether his petition has satisfied the nonjurisdictional, but nonetheless important, procedural prerequisites to federal habeas corpus review.

At the time of his direct appeal, the three claims Mr. Smith now raises in federal court – *Brady* violations, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel[29] – were unavailable to

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[29] Mr. Smith's claim of ineffective assistance of appellate counsel relates to Mr. Harris' representation in Mr. Smith's direct appeal to the New Mexico Supreme Court after his conviction. As noted above, the New Mexico Constitution mandates that an appeal from a judgment imposing a sentence of death or life imprisonment "shall be taken directly to the supreme court." N.M. Const. art. VI, § 2. This appeal was therefore a direct appeal as of right, and not a ruling after a grant of discretionary review, even though the appeal was to the state supreme court and not the state intermediate court of appeals.

him. In his state petition for post-conviction relief, however, he was permitted to, and did in fact, litigate these three claims on the merits. Thus, he has undoubtedly exhausted these claims by fairly presenting them to the state courts, *see, e.g., Rose v. Lundy*, 455 U.S. 509, 518-20

Accordingly, it is clear Mr. Smith did in fact have a constitutional right to the effective assistance of counsel on appeal. *See Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (noting the Sixth Amendment right to counsel during a criminal defendant's first appeal as of right recognized in *Douglas v. California*, 372 U.S. 353 (1963) encompasses the right to *effective assistance* of counsel during that appeal).

Mr. Smith is not challenging his representation during any of his collateral proceedings, either state or federal, presumably in recognition of the fact that he has no Sixth Amendment right to counsel during such proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 555-56 (1987) (because precedent holds a criminal defendant has no constitutional right to counsel beyond the first appeal of right, there is no right to counsel, and thus, no right to effective assistance of counsel, during proceedings collaterally attacking the validity of a conviction). This is true because the Sixth Amendment right to counsel applies only to criminal proceedings, *see Maine v. Moulton*, 474 U.S. 159, 170 (1985), and habeas corpus proceedings are civil in nature, *see Hilton v. Braunskill*, 481 U.S. 770, 776 (1987), as our sister circuits have properly recognized. *See, e.g., Hoggard v. Purkett*, 29 F.3d 469, 471 (8th Cir. 1994); *Barkauskas v. Lane*, 946 F.2d 1292, 1294 (7th Cir. 1991).

(1982), and they are therefore ripe for federal habeas corpus review.[30]

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[30] One final comment regarding the procedural stature of this case is in order before turning to a discussion of the merits. Rule 9(a) of the Rules Governing § 2254 Proceedings "provides the state with an equitable defense to *unjustifiably* delayed petitions." *Hannon v. Maschner*, 845 F.2d 1553, 1555 (10th Cir. 1988) (emphasis added). The State of New Mexico, however, has never, either in its brief or at oral argument, asserted prejudice in its ability to respond to Mr. Smith's claims due to the fact that this case is over seventeen years old.

This defense of prejudice in the ability to respond is equitable in nature, akin to laches. *See, e.g., Walters v. Scott*, 21 F.3d 683, 686 (5th Cir. 1994) ("Rule 9(a) codifies the equitable doctrine of laches as applied to habeas corpus petitions.") (footnote omitted); *Smith v. Duckworth*, 910 F.2d 1492, 1494 (7th Cir. 1990) (citing cases). *But cf. Heflin v. United States*, 358 U.S. 415, 420 (1959) (stating that under 28 U.S.C. § 2255, "there is no statute of limitations, no *res judicata*, and . . . the doctrine of laches is inapplicable.") (Stewart, J., concurring). Therefore, we view this defense of prejudice in the ability to respond as an affirmative defense which, if not pled, as in the case at bar, is waived. *See Bragan v. Morgan*, 791 F. Supp. 704, 717 n.14 (M.D. Tenn. 1992), cited in 8C Moore's Federal Practice § 14.09[2] n.5; *cf.* Fed. R. Civ. P. 8(c) (laches is an affirmative defense). In addition, the fact that the State may be prejudiced if it is required to retry Mr. Smith is irrelevant to a Rule 9(a) defense. *Hannon*, 845 F.2d at 1556) (citing *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986)). The prejudice inquiry under Rule 9(a) is limited to prejudice in the State's ability to respond to the allegations in the petition because of petitioner's delay in filing it, and not prejudice to the State's ability to retry the petitioner. *See Hannon*, 845 F.2d at 1555-56 (discussing *Vasquez*, 474 U.S. at 265); *cf. United States v. Nahodil*, 36 F.3d 323, 327-28 (3d Cir. 1994) (prejudice to the government's ability to retry the defendant "is not a consideration when ruling upon a § 2255 motion.").

II. DISCUSSION

We now turn to the merits of Mr. Smith's arguments on appeal, beginning with his claim that the prosecution

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Although prejudice is not an issue in this case, we feel compelled to point out we would likely reject such a claim because we do not believe the lapse of time in bringing the federal petition in this case was either inexcusable or inordinate. In fact, although Mr. Smith has been litigating his appeals for over seventeen years, almost one third of that time has been spent waiting for a disposition by the two federal magistrate judges who handled this case. In addition, post-conviction proceedings in New Mexico state court took three years to complete, although half the delay there is attributable primarily to collateral procedural litigation before the New Mexico Supreme Court regarding the writ of prohibition; the other half of that three-year delay is, however, unexplained. In federal court, the federal magistrate judges took in excess of five years and two months to issue a report and recommendation on Mr. Smith's federal petition.

We recognize this case, like many habeas corpus cases, has a voluminous record requiring a great deal of time and attention. Some of the delay before the federal district court was attributable to the numerous extensions of time requested by both sides; however, some of the delay, including a lapse of over two and a half years from August 1990 to May 1993, is unexplained. We reaffirm our disapproval of such inordinate and unreasonable delays in the absence of some reasonable explanation why it was necessitated. "Plainly, 'the writ of habeas corpus, challenging detention, is reduced to a sham if the trial courts do not act within a reasonable time.' " *Johnson v. Rogers*, 917 F.2d 1283, 1284 (10th Cir. 1990) (quoting *Jones v. Shell*, 572 F.2d 1278, 1280 (8th Cir. 1978)). While the record does not indicate all the reasons for the delays, we reiterate our prior rejection of a defense based on docket congestion. *See Johnson*, 917 F.2d at 1284-85 (granting a writ of mandamus based on fourteen-month delay); *id.* at 1284 (the writ of habeas corpus is "intended to afford a swift and imperative remedy in all cases of illegal restraint or confinement." (Citations omitted)).

failed to disclose various pieces of material exculpatory evidence. We start with an overview of the *Brady* doctrine.

A. The *Brady* Doctrine

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87; *accord United States v. Buchanan*, 891 F.2d 1436, 1440 (10th Cir. 1989), *cert. denied*, 494 U.S. 1088 (1990). "This oft-quoted language established the prosecutor's broad duty to disclose exculpatory material to the defense." *Buchanan*, 891 F.2d at 1440.

The disclosure principles of *Brady* are not rooted in the discovery rules of the Federal Rules of Criminal Procedure. *See United States v. Agurs*, 427 U.S. 97, 107 (1976); *United States v. Bonnett*, 877 F.2d 1450, 1459 (10th Cir. 1989) ("*Brady* is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation" (citations omitted)). Rather, they are grounded in the constitutional

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Furthermore, Rule 4 of the Rules Governing § 2254 Proceedings provides a petition for habeas corpus relief "shall be presented *promptly* to a judge of the district court" and that the petition "shall be examined *promptly* by the judge to whom it is assigned." While we are all too familiar with the overwhelming number of prisoner law suits and the burden they place on the district courts and their dockets, the fact remains these suits, which involve an individual's liberty, must receive an appropriate degree of attention. We are confident, however, that this case is an aberration and that the circumstances presented here are unlikely to recur in the future.

guarantee of due process of law contained in the Fifth and Fourteenth Amendments of the Constitution.[31] *See Agurs*, 427 U.S. at 107; *Brady*, 373 U.S. at 86. The essence of the *Brady* rule is the proposition that nondisclosure of material exculpatory evidence violates a defendant's due process right to a fair trial. *See, e.g., United States v. Bagley*, 473 U.S. 667, 675 (1985) ("The *Brady* rule is based on the requirement of due process.") (opinion of Blackmun, J.); *United States v. Robinson*, 39 F.3d 1115, 1118 (10th Cir. 1994) ("Due process mandates disclosure"); *United States v. Fleming*, 19 F.3d 1325, 1330 (10th Cir.) (same),[32] *cert. denied*, 115 S. Ct. 93 (1994).

We must be cognizant of the fact that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character

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[31] Because a *Brady* claim is in fact a due process claim, it is clear that we are empowered, under the appropriate circumstances, to grant federal habeas corpus relief "on the ground that [the petitioner] is in custody in violation of the *Constitution* . . . of the United States." 28 U.S.C. § 2254(a) (emphasis added).

[32] *Brady* relied on earlier Supreme Court cases holding "rudimentary demands of justice" were offended by the prosecution's failure to disclose evidence showing that a conviction was obtained through the knowing use of perjured testimony. *See, e.g., Pyle v. Kansas*, 317 U.S. 213, 216 (1942) (citing *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)). In *Napue v. Illinois*, 360 U.S. 264 (1959), the Supreme Court extended *Mooney* and held "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Id.* at 269. Thus, the grounding of *Brady* in the requirements of due process was merely an extension of prior case law. *See generally Bagley*, 473 U.S. at 679 n.8 (discussing the case law upon which *Brady* rested).

of the prosecutor." *Agurs*, 427 U.S. at 110; *see also Smith v. Phillips*, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases [alleging a *Brady* violation] is the fairness of the trial, not the culpability of the prosecutor."). As a result, it is irrelevant for *Brady* purposes " 'whether the nondisclosure was a result of negligence or design.' " *Buchanan*, 891 F.2d at 1442 (quoting *Giglio v. United States*, 405 U.S. 150, 154 (1972)); *see also Brady*, 373 U.S. at 87 (noting that suppression of material exculpatory evidence violates due process "irrespective of the good faith or bad faith of the prosecution"); *United States v. Pedraza*, 27 F.3d 1515, 1527 (10th Cir. 1994) (same), *cert. denied*, 115 S. Ct. 347 (1994); *United States v. Montoya*, 716 F.2d 1340, 1345-46 (10th Cir. 1983).

The purpose of *Brady* "is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." *Bagley*, 473 U.S. at 675. *Brady* and its progeny are thus grounded in notions of fundamental fairness and they embody a practical recognition of the imbalances inherent in our adversarial system of criminal justice. *See, e.g., Bagley*, 473 U.S. at 692-95 (Marshall, J., dissenting). To compensate for these imbalances, *Brady* represents a "limited departure from a pure adversary model" in the interest of promoting and enhancing the search for truth. *Bagley*, 473 U.S. at 675 n.6; *see also United States v. Abello-Silva*, 948 F.2d 1168, 1180 (10th Cir. 1991) ("The government's hand is stacked with cards the defense lacks."), *cert. denied*, 113 S. Ct. 107 (1992). Equally important, *Brady* acknowledges "that the prosecutor's role transcends that of an adversary" because the prosecutor, acting as the representative of the sovereign, has

an obligation to ensure " 'not that it shall win a case, but that justice shall be done.' " *Bagley*, 473 U.S. at 675 n.6 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)); *see also Brady*, 373 U.S. at 87-88.

Of course, the *Brady* principle has limitations. The Constitution, as interpreted in *Brady*, does not require the prosecution to divulge every possible shred of evidence that could conceivably benefit the defendant. *See, e.g., Moore v. Illinois*, 408 U.S. 786, 795 (1972) ("We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case."); *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988) ("The Government has no obligation to disclose possible theories of the defense to a defendant."). Due process only requires the disclosure of material exculpatory evidence which, "if suppressed, would deprive the defendant of a fair trial." *Bagley*, 473 U.S. at 675. Therefore, in order to establish a *Brady* violation, the defendant bears the burden[33] of establishing: "1) that the prosecution suppressed evidence; 2) that the evidence was favorable to the accused; and 3) that the evidence was material." *United States v. Hughes*, 33 F.3d 1248, 1251 (10th Cir. 1994) (citing *United States v. DeLuna*, 10 F.3d 1529, 1534 (10th Cir. 1993)); *accord Fero v. Kerby*, 39 F.3d 1462, 1472 (10th Cir. 1994). We

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[33] It is clear the defendant bears the burden of establishing a *Brady* violation. *See, e.g., Bonnett*, 877 F.2d at 1459; *United States v. George*, 778 F.2d 556, 561 (10th Cir. 1985) ("the burden is on the defendant to establish the failure to disclose was violative of his due process rights.").

address the guiding legal principles governing each of these requirements in turn.

1. Suppression of Evidence

The first element requires proof that the "prosecution" suppressed or withheld the evidence in question. Several issues are particularly relevant to the determination in the case at bar of whether specific evidence was suppressed or withheld. First, as indicated above, the term "suppression," in the *Brady* context, does not require a finding of bad faith or any other culpable state of mind on the part of the prosecutor.[34] *See Brady*, 373 U.S. at 87.

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[34] As we noted in *Fero*:

> "The Supreme Court's jurisprudence divides cases involving nondisclosure of evidence into two distinct universes. *Brady* and its progeny address exculpatory evidence still in the government's possession. [*Arizona v. Youngblood*, 488 U.S. 51 (1988)] and [*California v. Trombetta*, 467 U.S. 479 (1984)] govern cases in which the government no longer possesses the disputed evidence."

Fero, 39 F.3d at 1472 (quoting *United States v. Femia*, 9 F.3d 990, 993 (1st Cir. 1993)).

Thus, while the state of mind of the prosecutor is irrelevant to the question under *Brady* of whether the prosecution failed to *disclose* material exculpatory evidence, "the Due Process Clause requires a different result when we deal with the failure of the State to *preserve* evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988) (emphasis added). In order to prevail on a claim that the prosecution "destroy[ed] or otherwise fail[ed] to preserve potentially exculpatory evidence, the defendant bears the burden of demonstrating that the government

Second, the prosecutor is the party who is ultimately accountable for the nondisclosure of evidence. *See Giglio*, 405 U.S. at 154. Third, the "prosecution" for *Brady* purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, *see id.*, as well as law enforcement personnel and other arms of the state[35] involved in investigative aspects of a particular criminal venture. Logically, then, it follows that because " ' "investigative officers are part of the prosecution, the taint on the trial is no less if they, rather than the prosecutors, were guilty of nondisclosure." ' " *Buchanan*, 891 F.2d at 1442 (quoting *United States v. Endicott*, 869 F.2d 452, 455 (9th Cir. 1989) (quoting *United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978))).

Thus, while proof the prosecutor had actual knowledge of the existence of the evidence at issue would be sufficient to establish the suppression element of a *Brady* claim, such proof is by no means necessary. For purposes of *Brady*, "[k]nowledge by police or investigators is . . . imputed to the prosecution." *Buchanan*, 891 F.2d at 1442 (citations omitted). Our recent decision in *Fero*, which

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acted in bad faith in doing so." *Pedraza*, 27 F.3d at 1527 (citing *Youngblood*, 488 U.S. at 58); *accord Fleming*, 19 F.3d at 1331. Because Mr. Smith has not raised a *Youngblood* claim, but only *Brady* claims, we need not concern ourselves with the prosecutor's state of mind.

[35] "The duty to produce requested evidence falls on the state; there is no suggestion in *Brady* that different 'arms' of the government are severable entities. . . . 'The duty to disclose is that of the state, which ordinarily acts through the prosecuting attorney.' " *Martinez v. Wainwright*, 621 F.2d 184, 186-87 (5th Cir. 1980) (quoting *Barbee v. Warden, Maryland Penitentiary*, 331 F.2d 842, 846 (4th Cir. 1964)).

reaffirmed the continuing vitality of this constructive knowledge doctrine in the *Brady* context, stated "[b]ecause the police are considered agents of the prosecution for *Brady* purposes, the fact that it was the police and not the prosecutor who misplaced the [evidence], *is irrelevant.*" *Fero*, 39 F.3d at 1472 n.12 (emphasis added) (citing *Buchanan*, 891 F.2d at 1442); *see also Ballinger v. Kerby*, 3 F.3d 1371, 1377 (10th Cir. 1993) (Kelly, J., dissenting) ("Even imputing the nondisclosure of this [evidence] to the prosecutor").[36]

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[36] The question of how much of the knowledge possessed by various arms of the State should be imputed to the prosecution is an issue of first impression in this circuit. Clearly, if the prosecution had actual knowledge that several arms of the State were involved in the investigation of a particular case, then the knowledge of those arms is imputed to the prosecution. In the absence of actual knowledge, however, the circuits are somewhat split as to the precise contours of when knowledge by an arm of the State will be imputed to the prosecution. For example, the First and Third Circuits have taken an expansive view and have imputed a broad range of knowledge to the prosecution. *See United States v. Thornton*, 1 F.3d 149, 158 (3d Cir.) (citing *United States v. Perdomo*, 929 F.2d 967, 970 (3d Cir. 1991), *cert. denied*, 114 S. Ct. 483 (1993), for the proposition that "[t]he prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses."), *cert. denied*, 114 S. Ct. 483 (1993)); *United States v. Osorio*, 929 F.2d 753, 760-62 (1st Cir. 1991) (recognizing a prosecutor's duty to "demand compliance with disclosure responsibilities by all relevant dimensions of government."). The Fifth Circuit has taken a more moderate approach. *See Williams v. Whitley*, 940 F.2d 132, 133 (5th Cir. 1991) ("the prosecution is deemed to have knowledge of information readily available to it"). The District of Columbia and the Ninth Circuits have not clearly defined the extent of the obligation. *See United States v. Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992) (prosecutor's duty to

2. Exculpatory Nature of the Evidence

The second element of a *Brady* claim requires proof the evidence in question was exculpatory, or favorable, to the defendant. In this regard, it is worth noting that " 'because impeachment is integral to a defendant's constitutional right to cross-examination, there exists no pat distinction between impeachment and exculpatory evidence under *Brady.*' " *Ballinger*, 3 F.3d at 1376 (quoting *Buchanan*, 891 F.2d at 1443); *accord Hughes*, 33 F.3d at 1252. This is especially true "[w]here a witness' credibility is material to the question of guilt." *Fleming*, 19 F.3d at 1330; *see also Giglio*, 405 U.S. at 154-55. As Justice Blackmun stated in *Bagley:*

> Impeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule. *See Giglio v. United States*, 405 U.S. 150, 154 (1972).

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disclose extends to material maintained by branches of government "closely aligned with the prosecution."); *United States v. Jennings*, 960 F.2d 1488, 1490 (9th Cir. 1992) (obligation on prosecution under *Brady* extends to production of "any favorable evidence in the personnel records" and citing cases that the prosecution must produce materials even if they are in the possession of another agency).

In this case, it is undisputed that the Bernalillo County district attorney's office had actual knowledge that there were two separate investigations into these homicides by the authorities in Bernalillo County and by the authorities in Torrance County. Because the prosecution had actual knowledge of the fact that these two arms of the State were investigating this case, it is reasonable to impute the knowledge possessed by each entity to the prosecution under *Brady*. Furthermore, this fact relieves us from having to determine the full extent of when knowledge possessed by an arm of the State will be imputed to the prosecution.

> Such evidence is "evidence favorable to an accused," *Brady*, 373 U.S. at 87, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

473 U.S. at 676-77.[37] In sum, then, the fact that a particular piece of evidence is probative only for purposes of impeachment is not a defense to a *Brady* claim because " '[i]mpeachment evidence merits the same constitutional treatment as exculpatory evidence.' " *Abello-Silva*, 948 F.2d at 1179 (citation omitted).

3. The Materiality of the Evidence

The third and final element of a *Brady* claim requires proof that the evidence was "material either to guilt or to punishment." *Brady*, 373 U.S. at 87; *see also Ballinger*, 3 F.3d at 1376. "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is

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[37] The case law uses the terms "favorable" and "exculpatory" interchangeably. This distinction may be traceable to an ambiguity after the *Brady* decision on the issue of whether impeachment evidence, which is arguably "favorable" but not "exculpatory" *per se*, was subject to *Brady* disclosure. Because the Supreme Court answered the question in the affirmative in *Giglio*, holding impeachment evidence is subject to *Brady* disclosure, we see no significant difference between the two terms.

a concern that the suppressed evidence might have affected the outcome of the trial." *Agurs*, 427 U.S. at 104; *Buchanan*, 891 F.2d at 1441.

"The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt." *Agurs*, 427 U.S. at 112 (footnote omitted). The Supreme Court first addressed the materiality question in *Agurs*, enunciating three different standards[38] of materiality dependent upon "the specificity of the defendant's request and the conduct of the prosecutor." *Buchanan*, 891 F.2d at 1441.

If the defendant made a specific request for disclosure of an identifiable piece of evidence, then the prosecution was on specific notice of what was sought. Thus, the standard of materiality should be, and was, more lenient than if the defendant made either a general request for "all *Brady* evidence" or no request at all, both of which fail to provide any descriptive notice of what is being sought. *See Bagley*, 473 U.S. at 678-83 (discussing *Agurs*, 427 U.S. at 103-12).

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[38] The Supreme Court enunciated a fourth standard of materiality for the exceptional case where the undisclosed evidence would demonstrate "the prosecutor's knowing failure to disclose that testimony used to convict the defendant was false." *Bagley*, 473 U.S. at 678. In those rare situations, the evidence is presumptively material "unless failure to disclose it would be harmless beyond a reasonable doubt." *Id.* at 680. The justification for this presumption of materiality is that by affirmatively using perjured testimony, or by passively failing to correct what is known to be perjured testimony under *Napue*, the prosecution is participating in a "corruption of the truth-seeking function of the trial process." *Agurs*, 427 U.S. at 104.

Agurs specifically considered the obligation of the prosecution in cases where no request was made. Recognizing that disclosure obligations are tied to the level of notice afforded to the prosecution, the Court held:

> If there is a duty to respond to a general request . . . it must derive from the obviously exculpatory character of certain evidence in the hands of the prosecutor. But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, *that duty should equally arise even if no request is made. . . . [W]e conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases . . . in which there has been no request at all.*

Agurs, 427 U.S. at 107 (emphasis added). Therefore, while it is certainly more prudent for defense counsel to at least make a "general request" for *Brady* material rather than no request at all, the failure to make any request does not relieve the prosecution of its obligation to disclose evidence with an "obviously exculpatory character."

As a practical matter, this must be true, at least in situations where defense counsel simply has no way of knowing the prosecution possesses certain exculpatory evidence. *See Agurs*, 427 U.S. at 106 ("In many cases, however, exculpatory information in the possession of the prosecutor may be unknown to defense counsel."). Any other rule would penalize criminal defendants for their counsel's failure to be prescient. Moreover, if defense counsel knew the prosecution possessed particular exculpatory evidence, counsel could vitiate this entire problem

by making a specific request for that evidence. It is precisely because defense counsel does not, and cannot, know what potentially exculpatory evidence the prosecution possesses that there cannot realistically be any meaningful distinction between the prosecution's obligation under *Brady* in a "general request" case and its obligation in a "no request" case. If the prosecution possesses evidence that, in the context of a particular case is obviously exculpatory, then it has an obligation to disclose it to defense counsel whether a general request is made or whether no request is made. This represents a paradigmatic example of the imbalances inherent in the criminal justice process, and it serves to illustrate the purpose behind the *Brady* doctrine.

The *Agurs* framework, however, was unnecessarily rigid and the semantic distinctions between the different standards of materiality were often difficult to apply in practice. In *Bagley*, five members of the Court, through two separate opinions, adopted a single standard of materiality "sufficiently flexible to cover the 'no request,' 'general request,' and 'specific request' cases." *Bagley*, 473 U.S. at 682 (opinion of Blackmun, J.); *id.* at 685 (opinion of White, J.);[39] *see also Bowen v. Maynard*, 799 F.2d 593, 603

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[39] Justice Blackmun's opinion was joined by Justice O'Connor, and Justice White's concurrence, which specifically agreed with this definition of materiality, was joined by Chief Justice Burger and then-Justice Rehnquist. *See Hughes*, 33 F.3d at 1252 n.3 (quoting *Ballinger*, 3 F.3d at 1376 n.4); *see also Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (noting that a majority of the justices of the Supreme Court have adopted the definition of materiality enunciated in *Bagley*). "Accordingly, the plurality opinion [of Justice Blackmun] may be taken to state the holding

(10th Cir.) (discussing the three standards of materiality under *Agurs* and noting that after *Bagley*, courts are to apply "a single test . . . to all instances of nondisclosure, including specific request, general request and no request cases"), *cert. denied*, 479 U.S. 962 (1986). Under this standard, "[t]he evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682; *accord Fero*, 39 F.3d at 1472; *Ballinger*, 3 F.3d at 1376.

Under this more flexible, sliding scale approach to assessing the materiality *vel non* of the evidence in question, the specificity of the request is inversely related to the prosecution's disclosure obligation. As the specificity of the defendant's request increases, a lesser showing of materiality will suffice to establish a violation. Conversely, as the defendant's request becomes more general or even nonexistent, a greater showing of materiality is required to establish a *Brady* violation.

In making the materiality determination, "we view the suppressed evidence's significance in relation to the record as a whole," *Hughes*, 33 F.3d at 1252 (citing *United States v. Wolf*, 839 F.2d 1387, 1391 (10th Cir.), *cert. denied*, 488 U.S. 923 (1988)), keeping in mind that "[w]hat might be considered insignificant evidence in a strong case might suffice to disturb an already questionable verdict."

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of the Court." *Waters v. Churchill*, ___ U.S. ___, 114 S. Ct. 1878, 1893 (1994) (Souter, J., concurring) (citations omitted)).

Robinson, 39 F.3d at 1119 (citing *Agurs*, 427 U.S. at 113). We are also to consider "any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case . . . in light of the totality of the circumstances." *Bagley*, 473 U.S. at 683.

We reiterate the question of "[w]hether the government was required to disclose certain evidence under *Brady* is a mixed question of law and fact which we review *de novo*." *Fleming*, 19 F.3d at 1330 (citing *Buchanan*, 891 F.2d at 1440); *Abello-Silva*, 948 F.2d at 1179. Therefore, "[t]he state court's ultimate conclusion under *Brady* . . . is not entitled to a presumption of correctness under section 2254(d) and is open to review by federal courts." *Bowen*, 799 F.2d at 610 (citing *Chaney v. Brown*, 730 F.2d 1334, 1344-46 (10th Cir. 1984), *cert. denied*, 469 U.S. 1090 (1985)); *see also Case*, 887 F.2d at 1393 ("No presumption of correctness attaches to legal conclusions or determinations on mixed questions of law and fact. Those are reviewed *de novo* on federal habeas review.").[40] Findings of fact by the district court are reviewed for clear error. *See Thomas v. Kerby*, 1995 WL 3405 *1 (10th Cir. Jan. 4, 1995) (a district

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[40] In *Wright v. West*, ___ U.S. ___, 112 S. Ct. 2482 (1992), the Supreme Court reconsidered the appropriate level of deference to be accorded to state court findings on mixed questions; the Court, however, declined to resolve the issue. *See id.* at 2489-92; *see also Ballinger*, 3 F.3d at 1376 n.3. Therefore, we continue to adhere to precedent, which mandates *de novo* review of mixed questions. *See, e.g., Fleming*, 19 F.3d at 1330 (*Brady* claims are mixed questions reviewed *de novo*); *Bowen*, 799 F.2d at 610 (same). *See generally Miller v. Fenton*, 474 U.S. 104, 112-18 (1985) (mixed constitutional questions are "subject to plenary federal review" on habeas).

court's factual findings in a habeas corpus case are reviewed for clear error) (citing *Hill v. Reynolds*, 942 F.2d 1494, 1495 (10th Cir. 1991)). We must now apply these principles to the facts of the present case.

B. Application to the Case at Bar

A review of the record in this case reveals the prosecution did in fact fail to disclose most, if not all, the evidence at issue. The State's primary defenses to Mr. Smith's claims were that the evidence was made available pursuant to the district attorney's "open file" policy, that the evidence was not withheld intentionally, or that the prosecutors did not have knowledge the evidence existed. Because these issues are largely irrelevant to *Brady* analysis, it follows that the State has not offered a legitimate defense to Mr. Smith's claims. Further, our confidence in the outcome of the trial has been seriously undermined by the cumulative effect of several of these nondisclosures. We therefore find, for reasons set forth below, Mr. Smith is entitled to federal habeas relief.

1. Police Reports

It is undisputed Mr. Smith made a specific request for police reports "relating to investigation or inquiring into circumstances surrounding these criminal complaints," and that the trial court entered an order requiring disclosure of "all police reports . . . made in connection with this case." In *Agurs*, the Supreme Court warned "[w]hen the prosecutor receives a specific and relevant request,

the failure to make any response is seldom, if ever, excusable." *Agurs*, 427 U.S. at 106. The State argues it had an "open file" policy in place that discharged its obligation under *Brady* by making this material available to the defense. We disagree.

An "open file" policy is neither mandated by the Constitution, *see Moore*, 408 U.S. at 795, nor is it *ipso facto* constitutionally sufficient. While an "open file" policy *may* suffice to discharge the prosecution's *Brady* obligations in a particular case, it often will not be dispositive of the issue. It is not difficult to envision circumstances where the prosecution possesses, either actually or constructively, *Brady* information that for some reason is not in the "file," such as material in a police officer's file (but not in the prosecutor's file) or material learned orally and not memorialized in writing. No one could reasonably argue that under those circumstances, assuming the evidence was exculpatory, the prosecution's *Brady* obligations would be satisfied by its "open file" policy. To adopt such a holding would permit the prosecution to discharge its obligations under *Brady* by talismanically invoking the words "open file policy," and thus circumvent the purpose behind *Brady*. We believe this reading of *Brady* is too formalistic and is flawed because it fails to recognize that *Brady* material may be found in places other than a prosecutor's file. The prosecution's affirmative obligation under *Brady* may often go beyond divulging what is in "the file."[41] Thus, while a prosecution's "open file" policy

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[41] To the extent an "open file" policy would be probative of the question of whether the prosecution acted in good faith in attempting to discharge its *Brady* obligation, we reiterate the state of mind of the prosecutor is irrelevant to the *Brady* inquiry.

is relevant and may be considered in determining whether a *Brady* violation occurred, it cannot, standing alone, be given dispositive weight.

a. Officer Morrison's Report

In the present case, it is clear as a threshold matter that the report prepared by Officer Morrison of the New Mexico State Police, that contained information relating to "Randy" Newell's presence near the vicinity of the bodies on two separate occasions, to the clothes taken from his car and to his status as a suspect in this investigation, falls within the scope of the trial court's disclosure order. Although his report was initially necessitated by a traffic accident involving "Randy" Newell, both the contents of the report and the caption of the report indicate a relationship between the report and the Talton-McDonnell homicides. The report thus was relevant and within the umbrella of the defendant's request. The question then becomes whether it was disclosed.

The magistrate judge made a conclusory finding found [sic] that "[p]etitioner has not shown that the State failed to comply with its *Brady* obligation to turn over [Officer Morrison's] report." Although this finding is reviewed only for clear error, and although we are required to afford appropriate deference to the trial courts on factual matters, we must still scrutinize factual findings to insure that there is a sufficient evidentiary basis for the finding. In this case, while we do not do so lightly, we are convinced, for reasons set forth below, that this finding is clearly erroneous.

We are troubled by the fact that this "finding" of disclosure of Officer Morrison's report is unsupported by evidence in the record. In fact, the evidence in the record from the evidentiary hearing strongly suggests and supports a contrary finding, namely, that the report was not disclosed. For example, neither prosecutor had any recollection of specifically disclosing this report to Mr. Smith's counsel. Although no finding was made concerning whether this report was in the file in 1977, the State stipulated the report was not in the file in 1983. While far from conclusive, this fact tends to support a finding of nondisclosure, especially in light of the other evidence.

Mr. Harris' testimony was also consistent with a finding of nondisclosure as he testified he never received a copy of that report. But perhaps the most highly probative evidence relating to the disclosure *vel non* of this report is the conspicuous absence of any cross-examination of Mr. Newell on the matters contained in Officer Morrison's report, matters that were extremely relevant to Mr. Smith's defense.[42] The sum total of this evidence, coupled with the sheer absence of any evidence supporting a finding of disclosure, compels us to conclude the magistrate judge's finding of disclosure of this report was clearly erroneous.

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[42] Even if Mr. Harris' testimony is self-serving, thereby weakening this aspect of Mr. Smith's *Brady* claim, testimony that Harris had the report but did not utilize it would be, at the very least, incredible, given his defense at trial, and at most, highly persuasive evidence bearing on Mr. Smith's ineffective assistance of trial counsel claim.

Moreover, there can be no doubt the evidence contained therein was "favorable" to the defense. Officer Morrison's report would have provided important investigative leads and impeachment evidence to Mr. Smith and his attorney regarding "Randy" Newell. The evidence would have permitted more thorough impeachment of a critical state's witness and would have immeasurably strengthened Mr. Smith's defense that "Randy" Newell was the perpetrator and not Mr. Smith.

To the extent the magistrate judge concluded this impeachment evidence would merely have been cumulative, the record provides no support for this finding and it is therefore clearly erroneous. *See Anderson v. City of Bessemer*, 470 U.S. 564, 573-74 (1985). "Cumulative evidence" is defined as evidence "which goes to prove what has already been established by other evidence." Black's Law Dictionary 343 (5th ed. 1979). Officer Morrison's report might have been cumulative had the specific contents of it been disclosed to the defense at some other time. But, as the discussion below illustrates, the contents of the report were not disclosed nor was Mr. Newell ever impeached about any of the material contained in the report.

Thus, the potential impeachment value of the report cannot be said to be cumulative of anything already established on cross-examination of Mr. Newell. To the contrary, disclosure of this report would have alerted counsel to the existence of the clothing and permitted defense counsel to examine the clothing found and to have it tested. Furthermore, this information, taken together with Mr. Newell's already existing motive of

jealousy, which was established on cross-examination, would have undoubtedly inured to Mr. Smith's benefit.

The nondisclosure of this report, and the contents thereof, dramatically altered and limited the effectiveness of Mr. Smith's defense at trial. Additionally, while the knowledge the police were investigating Mr. Newell would arg ably carry significant weight with the jury in and of its f, that fact would also have been useful in "discredit g] the caliber of the investigation or the decision to ch rg the defendant," factors we may consider in assessing w her a *Brady* violation occurred. *Bowen*, 799 F.2d at 613.

Finally, we cannot agree with the state post-conviction court and the federal district court that, in the alternative, this evidence was not "material." We repeat that the failure to disclose this report, in light of a specific request for it, is "seldom, if ever, excusable." *Agurs*, 427 U.S. at 106. We believe the nondisclosure of this report clearly impacted the defense's preparation and presentation of its case at trial. *See Bagley*, 473 U.S. at 683. In addition, given Mr. Smith's defense at trial, the significance of "Randy" Newell's testimony, and the fact that the first trial resulted in a mistrial, we believe the disclosure of this evidence, considered in light of the entire record, can reasonably be said to have affected the outcome of the retrial so as to undermine our confidence in the verdict.

b. Sergeant Gonzales' Report

The same holds true for Sergeant Gonzales' report containing the critical information that Ms. Pitchford indicated "Randy" Newell was known as Samuel J. Newell. As we discuss below, there is evidence in the record that the prosecution learned this information from Detective Borunda. Detective Borunda stated he told the prosecutors sometime prior to the end of the retrial that he had learned "Randy" Newell was Samuel J. Newell.

Limiting the present discussion to Sergeant Gonzales' report, we note the record does not indicate whether this report was ever in the file. Harris testified he was never advised as to "Randy" Newell's true identity. If this report was in the file and was not disclosed, then a *Brady* violation occurred. But even if this report was not in the prosecutor's file, it is clear that for *Brady* purposes the knowledge of law enforcement personnel is imputed to the prosecutor, thereby constituting constructive knowledge of Newell's true identity. Accordingly, the State's argument, which was accepted by the magistrate judge, that Ms. Ferrara "did not *actually know* the true identity of Newell," is simply misplaced because actual knowledge is not necessary. Moreover, the State has not argued this information would not be evidence "favorable" to Mr. Smith, subject to *Brady* disclosure, thereby implicitly conceding that point, which is entirely proper in our view. Finally, we believe this evidence was "material" in that disclosure of "Randy" Newell's true identity, with the accompanying information regarding his prior convictions and fugitive status, can reasonably be said to have altered the verdict on this case.

2. "Randy" Newell's True Identity

The fact of "Randy" Newell's true identity, and the information as to his background, was not limited to Sergeant Gonzales' report. Detective Borunda testified he told one of the prosecutors some time before the end of the second trial that "Randy" Newell was Samuel J. Newell, and that he provided a rap sheet with Samuel J. Newell's record.

Although Detective Borunda testified he informed the prosecutors of this information, they denied ever learning of this fact or of ever obtaining a copy of a rap sheet for Samuel J. Newell, thereby creating a factual dispute in the record. If it was in fact true the prosecutors actually knew of Mr. Newell's real identity and nonetheless permitted him to testify under a false name, then this case would be governed by *Napue*, which held the prosecution may not knowingly fail to correct information it knows to be false. *See Napue*, 360 U.S. at 269. Under such circumstances, the nondisclosed evidence would be presumptively material unless the State demonstrates the nondisclosure was harmless error. *See Agurs*, 427 U.S. at 104.

In this case, the state post-conviction court and the magistrate judge implicitly found Detective Borunda's testimony not credible because both courts concluded there was no evidence the prosecution had actual knowledge of Newell's true identity. We cannot say this finding of the district court is clearly erroneous because the evidence is susceptible to two permissible interpretations depending on the weight given to the testimony of the respective witnesses. *See Anderson*, 470 U.S. at 573-74; *see*

also Exxon Corp. v. Gann, 21 F.3d 1002, 1005 (10th Cir. 1994) (appellate court must uphold district court's factual findings as long as they are "permissible" in light of the evidence in the record). The only way these courts could have reached their conclusions would be to discredit Detective Borunda's testimony, and we do not second-guess such credibility determinations on appeal. *See, e.g., Church v. Sullivan*, 942 F.2d 1501, 1516 (10th Cir. 1991) ("we treat a state court finding regarding witness credibility as a finding of fact."); *cf. Anderson*, 470 U.S. at 574-75 (emphasizing appellate courts owe heightened deference to trial court's credibility determinations under Rule 52(a)).

But while the factual determination that Detective Borunda did not convey this information to the prosecution avoids a *Napue* situation, it does not alter the fact that Detective Borunda, who himself was a member of the Albuquerque Police Department, knew of this false identity. Under prevailing principles governing *Brady* claims, this information, having been possessed by an investigative arm of the state that the prosecution knew was involved in investigating this case, is imputed to the prosecution under *Brady*. Accordingly, the prosecution is deemed to have known "Randy" Newell was actually Samuel J. Newell; whether they had actual knowledge of this fact is irrelevant.[43]

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[43] The finding that the prosecution did not have actual knowledge of Mr. Newell's true identity would demonstrate its failure to disclose was made in good faith. As we have repeatedly stated, however, state of mind is irrelevant under *Brady*.

In this respect, both the magistrate judge and the State manifested a misunderstanding of the applicable law. The magistrate judge repeatedly faulted Mr. Smith for failing to prove the prosecution's failure to disclose was done knowingly or intentionally. In so doing, however, we believe the magistrate judge placed an excessive burden on Mr. Smith because *Buchanan* and the discussion above hold exactly to the contrary, namely, that actual knowledge is not necessary to establish a *Brady* claim. The State, moreover, argues "[c]ommon sense infers the prosecution's obligation to disclose information is limited to that information which is in the possession of the prosecution." The problem is the State interprets the italicized language too narrowly, contending "possession" means "actual possession" and that "the prosecution" is limited to the prosecuting attorneys and not law enforcement personnel. For reasons already expressed, both of these interpretations of law are inaccurate.

It follows that because the State is deemed to have had knowledge of "Randy" Newell's true identity, it is accountable for failing to disclose his prior record of convictions and his fugitive status, which were the subject of a specific *Brady* request by Mr. Smith's counsel and which the State properly concedes are subject to *Brady* disclosure. Once again, for the same reasons discussed earlier, we find this evidence to be "material" because its nondisclosure undermines our confidence in the verdict. The prior convictions serve as significant impeachment evidence of Mr. Newell,[44] as does the fact he was

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[44] At the time of Mr. Smith's trial, New Mexico's rules of evidence provided for impeachment by prior convictions by

attempting to conceal his true identity. Furthermore, this evidence also supports Mr. Smith's defense that "someone else," someone with at least as strong of a motive as that attributed to Mr. Smith, may have committed these crimes.

The record thus discloses a classic situation where the left hand did not know what the right hand was doing. It appears that the various investigative agencies involved in this case constructed a wall separating the Bernalillo County investigation of Mr. Smith from the Torrance County investigation of Mr. Newell. But this lack of communication and coordination among arms of the state cannot be, and is not, a defense to the prosecution's failure to disclose favorable, material information to the defendant when that failure to disclose amounts to denying a criminal defendant a fair trial. *See Agurs*, 427 U.S. at 108.

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way of a statute modeled after Rule 609 of the Federal Rules of Evidence. *See* N.M. Stat. Ann. § 11-609(A)(1). It is clear impeachment of Mr. Newell with these prior convictions would be well within the scope of the rule, albeit subject to the district court's discretion to exclude this evidence. *Id.* While we cannot be absolutely certain of how the trial court would have exercised its discretion, we believe that in light of the importance of Newell's testimony and the defendant's desire to undermine his credibility as much as possible, *see State v. Lucero*, 648 P.2d 350, 352-53 (N.M. Ct. App. 1982) (citing these factors as ones to be considered in determining whether to permit impeachment by prior conviction), it is probable these convictions would in fact have been admissible for the limited purpose of impeaching Newell. The failure to admit them for that purpose would arguably have been an abuse of discretion under the circumstances of this case.

3. The Clothing Seized From "Randy" Newell's Car

We next address Mr. Smith's claim the prosecution failed to disclose the clothes seized from Mr. Newell's car. As indicated above, there is no distinction in the prosecutor's obligation to disclose *Brady* material when the defense makes a general request as compared to when the defense makes no request at all. If the evidence in question has an "obviously exculpatory character," then disclosure of that evidence is mandatory. *See Agurs*, 427 U.S. at 107.

In the present case, Mr. Smith argues the State was aware of the clothes prior to trial, that it suspected the substance on the women's underwear was blood but that it never tested the substance, and that it did not make the clothing available to the defense to allow it to test the substance. Thus, in the context of this case, given Newell's possible involvement in this case, Mr. Smith argues the prosecution violated *Brady* by failing to disclose the clothing. The State responds by arguing that any potential exculpatory value of the clothing is speculative since no testing was ever done, that the clothes were in the evidence room and were available upon request from Mr. Harris, and the magistrate judge found the clothing was not materia1.[45]

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[45] As noted below, the magistrate judge essentially adopted the state post-conviction court's determination on this issue. The magistrate judge, however, appears to have confused its obligation to give state court factual findings a presumption of correctness with its obligation to conduct a *de novo* review of the materiality of the evidence.

As an initial matter, there can be no doubt if the prosecution had tested the clothing, the results of those tests would have to be disclosed pursuant to the court's discovery order. That order provided, in relevant part, that the district attorney's office shall disclose to the defense, *inter alia*, "scientific experiments made in connection with this case, immediately, and shall continue to provide the copies to the defense counsel during the pendency of this action." The clothes, however, were never tested and no scientific reports ever produced before the clothes were destroyed. It is also undisputed both Ms. Ferrara and Mr. Anuskewicz knew these clothes existed prior to the start of the first trial in this matter; they had examined them at the evidence room in the Albuquerque Police Department.

The question thus becomes whether the prosecution had an obligation to disclose either the existence of these clothes, any testing of the clothes, or both,[46] to the defense, knowing that: they were seized from the vehicle of another suspect; everyone who examined the underwear said the substance might have been blood; the substance on the underwear was on the same side as the gunshot wound to Talton's leg; and Mr. Newell, a self-interested witness who was a suspect in these same crimes and who had been stopped in the vicinity where

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[46] Mr. Smith contends he was entitled to cross-examine Mr. Newell about the clothes found in his car, even if they were not tested, as the mere fact that the clothes were in his car would have been a legitimate area of cross-examination. While Mr. Newell would have stated the clothes were laundry, Mr. Smith contends the jury should have been permitted to hear this line of cross-examination in assessing Mr. Newell's credibility.

the bodies were found, indicated the substance was menstrual blood even though the substance was not in an area where menstrual blood would ordinarily be found. Under the unusual circumstances of this case, we believe the prosecution failed to comply with the requirements of *Brady* by not disclosing these clothes to the defense.

First, we once again reject the prosecution's reliance on its "open file" policy. The prosecution knew about the circumstances surrounding the seizure of these clothes, and Mr. Harris testified he was never made aware of their existence. He had no reason to know he should have asked to see these clothes since he did not know they existed.[47] While the clothes were marked in the evidence room with a tag, it stated "Articles from vehicle accident," and nothing more. Because Mr. Harris was never given the police reports indicating clothing had been seized from Mr. Newell's car and because he otherwise had no way of knowing he should be looking for these clothes, the prosecution's failure to advise him specifically of their existence was faulty.

Second, we have no trouble concluding this evidence was "favorable" to Mr. Smith. Even without medical tests of the clothing to evaluate whether the substance was in fact blood, the mere fact that Mr. Newell had these clothes in his car would itself have been a subject for cross-examination. As for the lack of any testing, the State's argument that the potential exculpatory value of

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[47] To the extent Mr. Harris' testimony is again self-serving, and he was aware of these clothes, his failure to utilize them at trial would again bear heavily on Mr. Smith's ineffective assistance of counsel claim.

testing is speculative because none was ever done is not persuasive. The State possessed these clothes and at least Ms. Ferrara recognized the potential importance of the substance on the clothes, and she thus suggested tests be done. In spite of this initial decision, no tests were ever performed and the clothes were never made available to the defense to allow it to conduct independent tests. Under these circumstances, the State may not now claim that whatever exculpatory value the clothes possessed was speculative.

Finally, while the State asserts this evidence was not "material," in reliance on the magistrate judge's conclusion, we again respectfully disagree with that ruling. Our *de novo* review of the entire record in this case convinces us the result of the proceeding could reasonably have been different had the clothes taken from Mr. Newell's car been disclosed to the defense. This evidence was highly probative with respect to Mr. Smith's defense at trial and could very well have resulted in the first jury returning an acquittal. Under the circumstances of this case, our confidence in the outcome of the proceeding has been undermined. We cannot say that the result of the trial would have remained the same had this evidence been disclosed. Therefore, we find this evidence was "material" for *Brady* purposes.

4. "Randy" Newell's Statements

The last pieces of evidence at issue are Mr. Newell's statements to various law enforcement personnel. Although it does not appear a specific request for these

statements was made, the State does not dispute its obligation to produce a witness' prior statements. The state post-conviction court found "[r]eports indicate statements were taken from Newell which statements were not in the files of the District Attorney, were not examined by the District Attorney, and which have never been located or verified as existing or as to content." The magistrate judge did not expressly address the merits of this claim, stating only:

> Petitioner . . . contends that much of the evidence marshalled by the Torrence [sic] County law enforcement, such as . . . statements made by Newell, were material and exculpatory and should have been disclosed. . . . The Bernalillo County investigation superseded the preliminary one of Torrence [sic] County. The Torrence [sic] County tapes were not part of that investigation.

Thus, the magistrate judge seemed to erect a wall between the two local investigations, notwithstanding the fact they were both state entities and that the prosecuting office was aware that both entities were involved in investigating this case.

The State attempts to defend the nondisclosure of these statements by arguing its "open file" policy, and further, that "[t]he prosecution apparently did not have possession of or use the supposed statements during the trial or for purposes of investigation." We have previously noted why the State's reliance on the "open file" policy is misplaced. As an aside, the issue of Mr. Newell's statements presents a perfect example of the inadequacy of an "open file" policy with respect to the prosecution's

obligations under *Brady*: the state postconviction court found that Mr. Newell's statements were not even in the file.

Furthermore, even assuming the prosecution did not know about these statements,[48] it is clear the various law enforcement personnel did. Accordingly, their knowledge is again imputed to the prosecuting attorneys for *Brady* purposes. The prosecution's alleged nonuse or lack of possession of these statements is an attempt by the State to alter the relevant inquiry. It remains undisputed the law enforcement personnel possessed these statements, and this is what is important, not whether the prosecution did or did not use or possess the statements.

Moreover, these statements are again evidence "favorable" to Mr. Smith as impeachment evidence relative to Mr. Newell's credibility. For the same reasons espoused above, we believe the failure to disclose these statements, when taken in conjunction with the other nondisclosures, undermines our confidence in the outcome of this case.

In sum, we hold the cumulative[49] effect of the prosecution's nondisclosures undermines our confidence in

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[48] Both Ms. Ferrara and Mr. Anuskewicz testified they knew Mr. Newell had given statements to certain individuals. Ms. Ferrara's knowledge is confirmed by her handwritten trial notes. Additionally, the state postconviction court's finding that the contents of these statements could never be verified is also questionable. Sergeant Gonzales indicated Mr. Newell told him the blood stains on the women's underwear found in his car were menstrual blood.

[49] Because there are multiple *Brady* violations involved in this case, we express no opinion on the question of whether any

the outcome of the trial. We perceive the primary cause for these nondisclosures to be a lack of communication between various law enforcement agencies of the State of New Mexico, rather than a deliberate suppression of evidence. Nonetheless, the prejudice resulting from the prosecution's failure to coordinate the various investigations in this case cannot be allocated to the defendant when his constitutional right to a fair trial lies in the balance. "[T]he existence of any small piece of evidence favorable to the defense may, in a particular case, create just the doubt that prevents the jury from returning a verdict of guilty." *Bagley*, 473 U.S. at 693 (Marshall, J., dissenting); *see also Robinson*, 39 F.3d at 1119. While some of this evidence, standing alone, may seem somewhat trivial, in the context of the entire record in this case, we believe the disclosure of all of this evidence might have led to a different result. In short, our confidence in the result of the retrial has been sufficiently undermined to warrant relief in this case.

Almost all of the nondisclosed evidence was relevant to Mr. Smith's attempt to demonstrate why "Randy" Newell had as much reason to have committed these murders as did Mr. Smith. The nondisclosure of this evidence altered and affected Mr. Smith's preparation and presentation of his defense at trial. The fact that the prosecution's case was entirely circumstantial, coupled with the fact that the jury in Mr. Smith's first trial was

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one of these violations, standing alone, would warrant relief. Moreover, because we conclude Mr. Smith is entitled to relief on his *Brady* claims, we express no opinion on his remaining arguments.

unable to reach a unanimous decision, creates a reasonable probability the result of the proceeding would have been different had this evidence been disclosed to the jury. Prosecutor Virginia Ferrara even expressed her skepticism at whether a conviction would have been possible if this evidence had been disclosed. *E.g., Bowen*, 799 F.2d at 610 (recognizing the relevance of the prosecutor's own views as to the effect the evidence would have had on the ability to convict). Therefore, we find Mr. Smith has sustained his burden of establishing he was denied a fair trial under *Brady*.[50]

CONCLUSION

The due process clause does not confer upon a criminal defendant a right to an error-free trial. *See United States v. Hasting*, 461 U.S. 499, 508-09 (1983). But it unquestionably guarantees a criminal defendant a fundamental right to a *fair* trial. *See Lutwak v. United States*, 344 U.S. 604, 619 (1953). For the reasons stated above, we are compelled to hold the prosecution's failure to disclose several pieces of relevant, material exculpatory evidence to Mr. Smith violated his constitutional due process right to a fair trial. In so doing, we merely applied settled principles of law to the facts of this case; we did not increase the prosecution's burden to disclose information nor did we increase the defendant's right to receive information. All we hold is that under the facts of this case, the prosecution did not fulfill its obligation to disclose to

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[50] Because we conclude Mr. Smith is entitled to federal habeas corpus relief based on his *Brady* claims, we need not address his remaining claims in support of his petition for relief.

Mr. Smith material exculpatory evidence. It bears repeating that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." *Napue*, 360 U.S. at 269.

Our holding should not be interpreted as undermining the important interests of comity and federalism inherent in our dual sovereignty system of governance. These interests undoubtedly command hesitation before acting under these circumstances; yet, these interests do not exist in a vacuum. They must be understood in light of the countervailing obligation of the federal courts to insure that a criminal conviction is not obtained in violation of the Constitution.

In sum, we **GRANT** Mr. Smith's request for a certificate of probable cause to appeal. Based on our conclusion his conviction is constitutionally infirm, we **VACATE** the conviction, and **REMAND** this case to the district court. In attempting to comply with our statutory mandate of disposing of habeas corpus proceedings "as law and justice require," 28 U.S.C. § 2243, *see also Burton v. Johnson*, 975 F.2d 690, 693-94 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1879 (1993), we instruct the district court on remand to enter an order directing the State of New Mexico, within ninety (90) days of the entry of that order, to either grant Mr. Smith a new trial or, in the alternative, to order his permanent release from custody.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILLIAM SMITH,

Petitioner,

vs. Civil No. 88-241 SC

SECRETARY, NEW MEXICO DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

(Filed Aug. 24, 1993)

Petitioner having filed a Notice of Appeal from the Order entered June 24, 1993, adopting the Magistrate's Proposed Findings and Recommended Disposition, and the Court finding no substantial issue of law for review,

Now, therefore,

IT IS ORDERED that no Certificate of Probable Cause for Appeal be issued.

/s/ Santiago E. Campos
SANTIAGO E. CAMPOS
U. S. DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

WILLIAM SMITH,

Petitioner,

vs. Civil No. 88-241 SC/LFG

SECRETARY, NEW MEXICO DEPARTMENT OF CORRECTIONS,

Respondent.

ORDER

(Filed June 24, 1993)

THIS MATTER came before the Court on the Magistrate Judge's proposed findings and recommended disposition and on Petitioner's objections to the proposed findings and recommended disposition. The Court conducted a *de novo* review of those portions of the Magistrate Judge's proposed findings and recommended disposition to which Petitioner objects.

IT IS HEREBY ORDERED that the proposed findings and recommended disposition of the United States Magistrate Judge are adopted by the Court.

IT IS FURTHER ORDERED that this action be, and it hereby is, dismissed with prejudice.

/s/ Santiago E Campos
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

WILLIAM SMITH,

Petitioner,

vs. CIVIL NO. 88-241 SC/LFG

SECRETARY OF NEW MEXICO DEPARTMENT OF CORRECTIONS,

Respondent.

MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION[1]

(Filed May 24, 1993)

Proposed Findings

1. This is a proceeding on a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Penitentiary of New Mexico located at Santa Fe, New Mexico, challenges the judgment and sentence of the Second Judicial District Court entered in *State v. Smith*, CR. No. 29460 (County of Bernalillo, New Mexico). A jury found Petitioner guilty of two

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[1] Within ten (10) days after a party is served with a copy of these proposed findings and recommendations, that party may, pursuant to 28 U.S.C. § 636(b)(1), file written objections to such proposed findings and recommendations. A party must file any objections within the ten-day period allowed if that party wants to have appellate review of the proposed findings and recommendations. If no objections are filed, no appellate review will be allowed.

counts of murder in the first degree in violation of NMSA 1978 §§ 40A-2-1 and 40A-29-3.1, and sentenced Petitioner to two consecutive life sentences.

2. Petitioner requests that an evidentiary hearing be held in the case at bar. The United States Supreme Court in *Keeney v. Tamayo-Reyes*, ___ U.S. ___, 112 S.Ct. 1715, 1720 n.5 (1992) described the conditions a Petitioner must meet to be entitled to a federal evidentiary hearing. First, Petitioner must show cause for his failure to adequately develop the facts material to his claim in the post-conviction state court hearing; second, Petitioner must show actual prejudice resulting from the failure to present the issues. In addition, Petitioner may satisfy his burden by demonstrating that a fundamental miscarriage of justice will result if a hearing is not held. A fundamental miscarriage of justice occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Murray v. Carrier*, 477 U.S. 478 (1986). The Court determines that an evidentiary hearing is not necessary as the matter can be resolved on the basis of the record. Petitioner failed to meet his burden under *Keeney*. Accordingly, Petitioner's request for an evidentiary hearing is denied.

3. Petitioner presents the following grounds for review:

I. Petitioner was denied due process by the State's failure to disclose material, exculpatory evidence concerning murderer Samuel Newell.

II. Petitioner was denied his Sixth Amendment right to counsel and a fair trial by the ineffective assistance of counsel.

4. "The Court has long held that state prisoners must exhaust state remedies before obtaining federal habeas relief." *Keeney*, 112 S.Ct. at 1720 (1992). Therefore, as a preliminary matter, the Court must determine whether Petitioner meets the exhaustion requirement of 28 U.S.C. § 2254(b) and (c). *See generally, Rose v. Lundy*, 455 U.S. 509 (1982). Exhaustion of a federal claim may be accomplished by either (a) showing the state's appellate court had an opportunity to rule on the same claim presented in federal court, or (b) that at the time he filed his federal petition, Petitioner had no available means for pursuing a review of his conviction in state court. *White v. Meachum*, 838 F.2d 1137, 1138 (10th Cir. 1988); *see also, Wallace v. Duckworth*, 778 F.2d 1215 (7th Cir. 1985); *Davis v. Wyrick*, 766 F.2d 1197 (8th Cir. 1985), *cert. denied*, 475 U.S. 1020 (1986). "The question with respect to exhaustion is not merely whether [Petitioner] has in the past presented his federal claim to the state courts, but also whether there is, under the law of the [state], any presently available state procedure for the determination of the merits of the claim." *Thomas v. Wyrick*, 622 F.2d 411, 413 (8th Cir. 1980). Respondent concedes, and this Court finds, that Petitioner exhausted available state remedies and that the petition is properly before the Court.

5. The procedural facts relevant to this petition are as follows. On or about August 9, 1977, Leslie D. McDonnel (McDonnel) and Cari Talton a/k/a Carie Newell (Talton), were murdered. On August 19, 1977, Petitioner and three others were charged with murder, kidnapping, accessory to murder and accessory to kidnapping. Petitioner was tried alone in October of 1977. The judge declared a mistrial because the jury was unable to reach a

unanimous decision. On January 30, 1978, the second trial began. This time, however, the jury found Petitioner guilty of two counts of first-degree Murder. Petitioner pursued a direct appeal. His conviction was affirmed. He subsequently filed a Rule 57 motion. The same judge who presided over his two trials held an evidentiary hearing and found the motion to be without merit.

6. This Court affords a presumption of correctness to explicit and implicit findings of fact made by state trial and appellate courts unless one of the eight factors enumerated in § 2254(d)[2] apply, or if the Court concludes the findings are not fairly supported by the record. In *Case v.*

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[2] The factors set forth in 28 U.S.C. § 2254(d) are:
(1) that the merits of the factual dispute were not resolved in the State court hearing;
(2) that the fact-finding procedure employed by the State court was not adequate to afford a full and fair hearing;
(3) that the material facts were not adequately developed at the State court hearing;
(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
(7) that the applicant was otherwise denied due process of law in the State court proceeding;
(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

Mondragon, 887 F.2d 1388, 1393 (10th Cir. 1989), *cert. denied*, 494 U.S. 1035 (1990), the court described the presumption of correctness as follows:

> The presumption applies to basic, primary, or historical facts and the inferences that can properly be drawn regarding them. No presumption of correctness attaches to legal conclusions or determinations on mixed questions of law and fact. Those are reviewed *de novo* on federal habeas review. However, the presumption of correctness will continue to apply to any findings of fact underlying mixed questions, typically "ultimate" constitutional issues such as due process.

The Court considers "a state court finding regarding witness credibility as a finding of fact." *Church v. Sullivan*, 942 F.2d 1501, 1516 (10th Cir. 1991). To those findings which are afforded the presumption of correctness, the Court's function is limited to ascertaining whether the findings are supported by the record. *Cox v. Lockhart*, 970 F.2d 448, 452 (8th Cir. 1992). Notwithstanding the presumption given to the factual findings, the Court conducts a *de novo* review of the State court's conclusion that effective assistance was given. *See Black v. Collins*, 962 F.2d 394, 401 (5th Cir. 1992), *petition for cert. filed* May 21, 1992; *Sims v. Livesay*, 970 F.2d 1575, 1579 (6th Cir. 1992); *Loyd v. Whitley*, 977 F.2d 149, 156 (5th Cir. 1992), *petition for cert. filed* February 22, 1993. Similarly, the issues posed under *Brady*, i.e. whether evidence is exculpatory, the adequacy of disclosure to the defense and the materiality of evidence are mixed questions of law and fact and, therefore, subject to *de novo* review. *See Bragen v. Morgan*, 791 F.Supp. 704, 718 (M.D. Tenn. 1992).

7. Following the Rule 57 evidentiary hearing, the judge issued findings of fact and conclusions of law. I reviewed the tapes of the Rule 57 hearing and find the factual determinations are supported by the record. Thus, I presume the factual determinations set forth in Attachment A to be correct, but will review *de novo* the conclusions made concerning materiality with regard to Petitioner's allegation of failure to disclose exculpatory evidence and his allegations of ineffective assistance of counsel.

8. Petitioner submits that the State failed to disclose exculpatory evidence which demonstrated the motive and opportunity for Samuel Newell, alias Randy Newell (hereinafter Newell), the husband of Talton, and not Petitioner, to murder Talton and McDonnel [sic]. In particular, he identifies the following information as exculpatory in nature that should have been disclosed, but was not: (1) the State knowingly allowed Newell to falsely identify himself at trial; (2) the State failed to disclose the criminal and fugitive status of Newell; (3) the State's failure to disclose investigative reports from Torrence [sic] County which targeted Newell as a prime suspect; (4) the State failed to disclose the seizure of victim Talton's bloody clothes from Newell's vehicle shortly after the murders; and (5) the State failed to disclose various tape recorded statements taken from Newell by investigators. The gravamen of Petitioner's allegations is that, had the information been disclosed, it would have discredited and impeached Newell's testimony by making him appear as the perpetrator of the crimes instead of Petitioner. Petitioner posits that Newell's testimony was especially damaging in three respects: (1) it provided a link in

establishing the time the victims were last seen alive; (2) he identified as Talton's a cigarette case found in Petitioner's van; and (3) he described the suspicious activities of two of Petitioner's co-defendants.

9. To fully appreciate Petitioner's arguments, it is helpful to describe the various police investigations which immediately preceded the deaths of Talton and McDonnel. One investigation was conducted by law enforcement officials in Torrence County, while another investigation was conducted by law enforcement officials in Bernalillo County. Samuel Newell was the focus of the Torrence County investigation. On August 14, 1977, Newell was stopped while driving by Officer Kennedy. The officer conducted a visual search of Newell's vehicle, but Newell did not consent to a search of his trunk because he stated he did not have the appropriate key. Four days later, he was stopped by Officer Morrison. Officer Morrison applied for a search warrant of the vehicle. In support of his affidavit for a search warrant, Officer Morrison indicated that Newell might have a motive for the murder of his wife. A judicial officer signed the warrant and a search of the car revealed a white plastic bag containing mildewed and blood stained garments belonging to a woman. The items were sent to the New Mexico State Police Crime Lab, which, for some unknown reason, performed no analysis of the blood on the clothes. At the time of the seizure of the clothes, Sheriff Chavez of Torrence County and the Office of the Medical Examiner took statements from Newell. The statement taken by Sheriff Chavez was never transcribed.

While the Torrence County investigation was proceeding, so too was an investigation by the Albuquerque

Police Department. The targets of this investigation were William Smith, Harvey Bylsma, Ginger Donham and Billy Grubbs. Ultimately, the investigation was completed and criminal proceedings against the four individuals were brought in Bernalillo County.

10. The United States Supreme Court in *Brady v. Maryland*, 373 U.S. 83 (1963), described the circumstances when a prosecutor must turn over evidence to a defendant. Under *Brady*, the prosecutor is obligated to turn over evidence favorable to an accused upon request "where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. In *United States v. Bagley*, 473 U.S. 667, 682 (1985), the Court defined materiality as follows:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Thus, *Brady* does not require the government to disclose all evidence, but only that which is exculpatory and material. The United States Court of Appeals for the Tenth Circuit described the distinction in *United States v. Comosona*, 848 F.2d 1110, 1115 (10th Cir. 1988):

> The Government has no obligation to disclose possible theories of the defense to a defendant. If a statement does not contain any expressly exculpatory material, the Government need not produce that statement to the defense. To hold otherwise would impose an insurmountable

> burden on the Government to determine what facially non-exculpatory evidence might possibly be favorable to the accused by inferential reasoning.

Accordingly, to succeed in his claim, Petitioner must show (1) the prosecution suppressed evidence; (2) the evidence was favorable to him; and (3) the evidence was material to the issue of guilt.

11. Petitioner represents that the State knowingly allowed Samuel Newell to testify using his brother's name (Randy Newell). To support this allegation, Petitioner points to Sergeant Archie Borunda's testimony at the Rule 57 hearing that he recalled being aware of Newell's true identity at some point during the second trial and a statement of Jean Pitchford taken by Sergeant Gonzales of the New Mexico State Police that Newell sometimes went by Randy Newell. At the Rule 57 hearing, the prosecutors testified the reports referred to Newell as Randy Newell, and Randy Newell's name was checked through NCIC. The NCIC report on Randy Newell was made available to the defense. There is no indication that the prosecutors were aware of Newell's true identity. Petitioner has not shown that the State failed to comply with its *Brady* obligation to turn over the report. There is no support in the record for the claim that the State was aware that Newell was using an alias. Since there is no indication the State knowingly failed to disclose information, Petitioner's contention that the State failed to disclose the criminal and fugitive status of Newell must likewise fail. Petitioner's counsel filed a motion seeking the arrest and conviction record of the witnesses.

The trial court granted the motion to the extent of producing records of convictions. This ruling is consistent with 1986 SCRA 5-501(5), which requires the State to identify all witnesses it intends to call, along with any statement made by the witness and any record of prior convictions known by the prosecutor. Arrest information is not subject to automatic disclosure. The prosecution called Newell as a witness, and a record of his convictions was disclosed. This is all that was statutorily required.

11. Petitioner also contends that much of the evidence marshalled by the Torrence County law enforcement, such as investigative reports, items taken from Newell's automobile and statements made by Newell, were material and exculpatory and should have been disclosed. Petitioner submits that because Officer Morrison, in his affidavit for a search warrant, stated that items relating to Talton's and McDonnel's murder might be located in the vehicle, the items were material for the issuance of a search warrant and similarly are material in the context of criminal discovery. Petitioner's argument is not well founded. Petitioner confuses different evidentiary standards applicable to search warrants, the standard being probable cause, with the standard governing disclosure by the prosecution in a criminal case. Under New Mexico law "[p]robable cause requires a showing of the existence of facts which would lead a judge or magistrate, acting in a neutral capacity and as a prudent person, to reasonably believe that evidence relating to the commission of a crime exists on the premises requested to be searched." *State v. Wisdom*, 110 N.M. 772, 800 P.2d 206 (N.M. Ct. App.), *cert. denied*, 1990 N.M. Lexis 324 (N.M.

1990). Whereas, the standard governing criminal discovery is set forth in SCRA 1986 5-501. This materiality standard requires the evidence to go to the question of the guilt or innocence. Thus, facts that may be important in the context of probable cause for the issuance of a search warrant do not carry the same weight in the discovery context. Petitioner also finds fault with the method of investigation. Petitioner places great significance on the work done by Torrence County, notwithstanding that the case was ultimately tried in Bernalillo County. Simply because one county's investigation disclosed certain information, it does follow that this information can be imputed to a different county's investigation since both counties are under the umbrella of the State of New Mexico. The Bernalillo County investigation superseded the preliminary one of Torrence County. The Torrence County tapes were not part of that investigation. In fact, since the Torrence County investigation was terminated, the tapes were never transcribed. All the physical evidence gathered in the case, including the bag containing the bloody clothes, was turned over to the New Mexico State Crime Lab and was housed in the same room as the other physical evidence from the investigation of the case. The evidence was available to the defense as the prosecution had an open-file policy and, thus, the prosecution met its burden under *Brady*. Petitioner has not shown that the evidence was intentionally kept from him.

Petitioner's argument is based upon the prosecutor's failure to analyze the blood. Petitioner hypothesizes that had the blood found on the women's undergarments been analyzed, it might have shown that it was not

menstrual blood as claimed by Newell, but Talton's blood from a wound inflicted when she was shot. This would have made it more likely that Newell committed the murder and not Petitioner. Such inferences are too speculative to warrant a finding that there is a reasonable probability that the outcome of the trial would be different. It is too attenuated a possibility to throw doubt on the verdict.

While the evidence Petitioner posits should have been disclosed may have been helpful to impeach Newell, it would, nevertheless, have been cumulative. Defense counsel effectively impeached Newell when he questioned him about a fight with Talton that culminated in her stabbing him in the leg. Defense counsel was able to secure Newell's admission that he owned a gun. Additional impeachment would have been cumulative. While it is possible the jury might have assessed his credibility differently had the additional evidence been proffered, it does not follow that the additional impeachment makes it a "reasonable probability" that the outcome of the trial would have been different. I reviewed the tapes and find that there was sufficient evidence to support the jury's finding of guilt. Specifically, there is evidence of Petitioner's anger toward the Talton and McDonnel because of his missing drugs; testimony placing him as the last person with the victims; he was off work on Tuesday; he owned a shotgun; Talton's cigarette case was found in his van; and testimony that one week after the killing, he took a gun to a friend's house for safekeeping and said he had punished "two girls." In conclusion, I find Petitioner's due-process allegation without merit. He has not shown that the State knowingly withheld exculpatory

evidence. There is no support for his contention that the State did not meet its obligation to disclose exculpatory evidence.

12. Petitioner also alleges that his attorney rendered ineffective assistance of counsel. The Court evaluates a Sixth Amendment right to effective counsel as follows:

> To succeed with a claim of ineffective assistance of counsel, a defendant must demonstrate "his attorney's performance fell below an objective standard of reasonableness" *and* that but for counsel's deficiencies a reasonable probability exists the proceedings would have resulted in a different verdict. Restated [Petitioner] must show his attorney's performance was both substandard and prejudicial to his defense, taking into account the strength of the government's case. Trial strategies necessarily evolve without the benefit of hindsight. Accordingly, we afford a high level of deference to the reasonableness of counsel's performance in light of all the circumstances at the time of the alleged error. The ultimate inquiry, of course, focuses " 'on the fundamental fairness of the proceeding.' "

United States v. Maxwell, 966 F.2d 545, 547-48 (10th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 826 (1992) (quoting from *United States v. Miller*, 907 F.2d 994, 997 and 997 n.6 (10th Cir. 1990)). Petitioner challenges the sufficiency of his attorney's pretrial investigation and the presentation of his alibi defense. He challenges the manner in which his attorney presented his theory of the case. Petitioner's attorney took the position that someone besides Petitioner was responsible for the two murders, although he did not specifically identify Newell as the responsible

party. Petitioner claims that his family gave counsel (hereinafter Harris) the names of the following individuals who should have been investigated: Samuel Newell, Dana Smith, Nickki Thompson (Peters), Mary "Shadow" Garcia, Theresa Hancock, Robert Hime, Linda "Cricket" Nelson, Phil Taylor, Bud Albert Smith, Donna Nargelovik to show Newell was the murder [sic]. Petitioner also claims his attorney should have hired his own expert witnesses.

13. As discussed *supra*, the same judge presided not only over the two trials, but also over the Rule 57 hearing. The court made credibility determinations concerning several of the individuals Petitioner claims should have been called as witnesses. The judge who made the credibility decisions was very familiar with the case because he presided over two trials on the merits and the Rule 57 hearing. The court found them not credible and I defer to this finding. Generally, counsel's decision not to call a witness is a tactical choice. *Coogan v. McCaughtry*, 958 F.2d 793, 799 (7th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 495 (1992). Counsel is not ineffective by refusing to construct his defense on the testimony of witnesses who are not very credible. I find counsel did a thorough job in his direct and cross-examination of witnesses. In trial, it is the strength of the evidence that is significant, and not the number of witnesses called. Petitioner supports his claim with affidavits by his current counsel and investigator describing the investigation that they have conducted suggests what should have been done by Harris. It is not the Court's role in evaluating claims of this sort to participate in Monday-morning quarterbacking of litigation decisions. Trial tactics and strategy are properly

determined by counsel. I reviewed the trial tapes and the tapes of the Rule 57 hearing and find that the defense presented by Harris did not fall below the *Strickland* standard. Harris put on an array of witnesses and did thorough cross examinations of the State witnesses. While Petitioner may be unhappy with the results of the case, such unhappiness does not rise to the level of a constitutional violation. This ground is without merit.

Recommended Disposition

That the petition be denied.

/s/ Lorenzo F. Garcia
LORENZO F. GARCIA
United States Magistrate Judge

APPENDIX E

STATE OF NEW MEXICO — COUNTY OF BERNALILLO

IN THE DISTRICT COURT

STATE OF NEW MEXICO,

Plaintiff,

vs. No. 29460 Criminal

WILLIAM J. SMITH,

Defendant.

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Feb. 24, 1984)

IT IS HEREBY ORDERED that all requested findings of fact and conclusions of law conflicting with those made by the Court are denied.

FINDINGS OF FACT

1. The memories of many of the individuals involved in this case including but not limited to Roy Anuskewicz, Virginia Ferrera, Warren Harris, Bob Gonzales, Officer Welsh, Officer Borrunda, and Officer Morrison are so diminished and deteriorated by time and the files of Warren Harris are now so incomplete that:

a) it is impossible to reconstruct with accuracy what was known to the prosecutors prior to and within two years after the trial of this case; and,

b) it is impossible to reconstruct with accuracy what was disclosed to attorneys representing William Smith.

2. Harris' files had passed through the hands of several attorneys engaged by Smith or his family with the permission of Smith or his family and several non lawyers and those files are now far from complete and have been so decimated by persons other than Harris as to render them almost useless in determining the materials that were furnished to Harris by the District Attorney or others and in determining the degree of investigation, preparation, and actual trial conduct of Harris.

3. The following were not credible witnesses: Celia Payne, John Parks, Mark Hopkins, Sandy Alford, Nicky Peters, and William J. Smith; and the following do not appear not to be credible witnesses were they to testify: Linda "Cricket" Nelson, Mary "Shadow" Garcia, and Dana Smith.

4. On or about August 9, 1977, Leslie D. McDonnel and Cari Talton were murdered. On August 19, 1977, William J. Smith (Smith) and Billy B. Grubbs were indicted for the murders. Also indicted were Harvey Bylsma and Ginger Donham. Attorneys Roy Anuskewicz and Virginia Ferrera handled the Smith case for the state.

5. Shortly after being charged, Smith retained Anthony Lucero to represent him on this charge. Approximately one week prior to the first trial, Warren Harris was retained to assist Mr. Lucero in the defense of Smith. Warren Harris entered his appearance on October 6, 1977. The trial commenced on October 11, 1977. On October 17, 1977, a mistrial was declared when the jury was unable to reach a unanimous decision.

6. In November, 1977, Mr. Lucero withdrew from the case and Mr. Harris became solely responsible for the representation of Smith.

7. The second trial commenced on January 30, 1978. On that day, Mr. Harris filed in open court motions for disclosure of information relating to sawed-off shotguns in possession of the police and the arrest and conviction record of state's witnesses, including Randy Newell. The trial concluded on February 4, 1978, when Smith was found guilty of murder as to Counts I and II of the indictment. On March 9, 1978, this Court sentenced Smith to two life terms to run consecutively.

8. A Notice of Appeal was filed on March 20, 1978, to the State Supreme Court challenging the conviction on substantive and procedural grounds.

9. The defendant retained new counsel. Lewis Fleishman, in March or April, 1979, later discharged him and retained Alice G. Hector. The Defendant and his family are now not satisfied with and have critized [sic] the representation of Smith by Anthony Lucero, Warren Harris, and Lewis Fleishman, each of whom Smith and/or his family hired. Smith and his family expressed complete satisfaction with representation by Warren Harris at the time of trial.

10. At all times, the District Attorney's Office had an open file policy as to each of the four defendants and their attorneys charged with the deaths in question and made available to each counsel all of the information in the file.

11. On August 18, 1977, New Mexico State Police Officer Donald R. Morrison arrested Randy Newell near Moriarty for driving while intoxicated. Morrison seized women's clothing, men's clothing, and a hammer from Newell's car. The clothes had spots similar to blood spots and the hammer appeared to have blood and hair on it. The items seized from the vehicle were turned over to the New Mexico State Police Crime Lab and placed with other evidence in the murder trial. The men's clothing and hammer were tested and the results were negative for blood and hair. The women's clothing was not tested.

12. Prior to trial, the State Police turned over to the Albuquerque Police Department all the evidence from the murder case, which evidence included the items seized from Newell's car. This evidence was placed by the Albuquerque Police Department with other evidence from the murder case, which evidence was available for inspection by the District Attorneys and counsel for each of the four defendants. Anuskewicz, Ferrara, and Harris inspected the evidence at the Albuquerque Police Department. The attorneys cannot remember exactly what evidence they looked at, but all was available for inspection. Results of all tests conducted on the physical evidence were available to the defendant's counsel.

13. Officer Morrison prepared a report of Newell's DWI arrest and seizure of the items. Roy Anuskewicz has no present recollection of receiving the report prior to the second trial or actually turning the report over to defense counsel. Officer Morrison's report was not in the state's Smith file when this motion was filed. Warren Harris does not recall receiving a copy of the report prepared by Officer Morrison and his files had been so dissipated as

to be useless in determining if it was in his file. Nothing in the report is exculpatory in nature. It is only speculation that this report could lead to relevant evidence. Defendant presented no evidence that once he received the report, he had followed up, or attempted to follow up on the report to determine if relevant evidence could be found.

14. The District Attorney made available to defense counsel all the items seized from Newell's car none of which is exculpatory. The clothing in question is not exculpatory. Defendant's only hope is that the spots on the untested women's clothing would test as human blood, then test as Cari Talton's blood, then test as other than menstrual blood, and then that the blood spots would be established as consistent with blood deposited in a pattern consistent with the shotgun wound to the hip area of Talton.

15. On August 16, 1977, Sergeant Gonzales of the New Mexico State Police prepared a Supplemental Report (Defendant's Exhibit A) that stated that Jean Pitchford told Sergeant Gonzales that Randy Newell was also known as Samuel J. Newell. All other investigation reports listed his name as Randy. The standard procedure in the District Attorney's Office for obtaining the record of convictions for witnesses is to send a witness list to the Albuquerque Police Department liaison who requests a rap sheet through the NCIC system and Ferrara believes this was done with the report on Randy Newell comming [sic] back negative. Neither Anuskewicz nor Ferrara submitted the name Samuel Newell. This report would have been available to defense counsel under the District Attorney's open file policy and Harris files have been so

dissipated as to be useless in determining if he had a copy of the report.

16. At the time of trial of this case, a Samuel Newell had a prior felony conviction for burglary on December 20, 1972, and a prior felony conviction for burglary on April 18, 1973. An arrest warrant was also outstanding from Sedgwick County, Kansas, from August 14, 1974. The District Attorneys had no knowledge of these convictions at the time of trials and did not learn of them until after this motion was filed.

17. Ferrara was told by Randy Newell just prior to one of the trials that he had a conviction for sale of MDA in Kansas. Ferrara did not know if the sale of MDA was a felony or misdemeanor. She assumed the witness was somehow mistaken because of the negative results obtained in requesting a rap sheet. The Court would not have allowed an MDA conviction into evidence to impeach a defendant or a witness.

18. Harris was not told of Newell's remarks to Ferrera about the sale of MDA conviction. This in no way was prejudicial to defendant nor would the information have affected the jury verdict.

19. Reports indicate statements were taken from Newell which statements were not in the files of the District Attorney, were not examined by the District Attorney, and which have never been located or verified as existing or as to content. Smith's attorneys were informed of the existence of tapes in Sheriff Chavez' possession, used Sheriff Chavez as a witness and had reports indicating there were statements. Defense counsel contacted employees of the Medical Examiner's Office

and had available to him the information in their files. The attorneys' memories are so incomplete as are Harris' file as to preclude verification that the statements and/or reports, if they existed, were actually given to defense counsel. If such statements exist, there is no evidence the statements would be contradictory in nature, contain exculpatory evidence, or be helpful in any way to the defense. There is no evidence current defense counsel has made any attempt to verify the statements ever existed, to secure the statements, verify their content, or show how they would be helpful to defendant except counsel's speculation about what might have been contained in them.

20. The defendant personally talked with Bud Albert Smith prior to the first trial and secured information including information about a sawed-off shotgun. Harris' file contains notes which contain information in the police report of the arrest of Bud Albert Smith. The District Attorney's Office did not receive the information until February 2, 1978, and it was received as part of a different prosecution, not as part of the murder cases. Defense counsel had direct access to Bud Albert Smith, and at the time of trial, had more information about the incident than the counsel trying the case for the state.

21. The significance of the shotgun was:

a) most importantly that defendant attempted to secret it; and,

b) defendant had access to one.

Both issues were professionally defended against. Any Police Department information regarding sawed-off

shotguns would not have been probative of the availability of shotguns in general to the public as a whole. There are substantially better ways to establish the general availability of shotguns. The success or failure of this motion for production of such information would not have affected the jury verdict.

22. The killing could have been with a regular shotgun not necessarily a sawed-off shotgun. The availability of altered shotguns is not relevant.

23. The fact that Bud Albert Smith lived in a residence where a shotgun was located on November 16, 1977, and Randy Newell had lived there at sometime after the murders but prior to November 11, 1977, without more, has no relevance to the Smith murder case.

24. Substantially prior to the second trial, the defense was aware of Linda "Cricket" Nelson, Dana Smith, and Mary "Shadow" Garcia, and knew they had asserted they had evidence or knowledge of the crime at the time of the first trial. Police interview of these persons led to the reasonable conclusion the girls were "strung out on drugs" at the time of the first trial and had no information of value. All relevant information possessed by these witnesses, if any, was available to the defense. There is no evidence that present counsel has attempted to locate these witnesses and present their testimony to the Court. Defendant can only speculate as to what admissible and relevant evidence they might have other than what was given to the Grand Jury.

25. Substantially after the second trial, the state learned that Linda "Cricket" Nelson asserted:

a) she had placed the call to Lois Strader on August 12, 1977, about 9:30 saying, "Your daughter is dead; contact Stubbs and Grubbs."; and,

b) she asserted Smith did the killings.

This evidence would not have helped Smith, nor would it have affected the jury verdict.

26. No request was made by counsel, during this motion hearing, for introduction of the testimony of Nelson at the Grand Jury and such evidence was not presented to this Court. This Court has no basis for determining:

a) if the testimony is admissible;

b) the testimony would be beneficial to defendant;

c) if the witness has any basis for her assertions; and,

d) if the witness would be credible on these subjects.

27. Nikki Thompson testified untruthfully at Smith's motion for new trial when she testified about her testimony at the prior trials and at the Grand Jury and the reason for such testimony.

28. There is no credible or admissible evidence Randy Newell was "close to" Sergeant Gonzales.

29. Donna Nargelovik's testimony supported Randy Newell's alibi. It did not challenge the alibi as asserted by defendant.

30. There is no credible evidence that Newell had an opportunity to kill the two girls or had any motive to kill Leslie McDonnell.

31. Warren Harris in the preparation and presentation of this case demonstrated skill, judgment, and diligence far exceeding that of a reasonably competent defense attorney.

32. Harris was adequately prepared to cross-examine the witnesses and to meet the issue relating to time of death, motive, opportunity, and other relative factors.

33. Harris, professionally and with great confidence, attacked the state's theory of the time of death through his cross-examination, the testimony of Shockey, Green, and Spruill of having seen the girls after the time the state asserted they were killed, and the testimony of the rancher Wayne Wallace who found the bodies and asserted that they could not have been there for the time the state asserted they were killed.

34. This Court would rate the defense of this case in the top ten percent of all criminal cases tried before this Court.

35. Harris presented two defenses:

a) the state could not prove Smith committed the crime; and,

b) alibi.

Both were solid defenses well presented. To present other, less solid defenses, could in the opinion of the Court:

a) dilute the good defenses; and,

b) give the impression of a "shot gun" defense leaving each "shot" less effective.

36. Kennedy, attorney for co defendant Harvey Bylsma, was a reasonably competent defense counsel at the time and was prepared to go to trial with similar or less preparation, investigation, defenses, and without developing a theory as to another person who actually did the killings.

37. A great majority of the "supposed evidence" given at this hearing was given by defense counsel in the nature of leading questions, mistated [sic] summaries of prior evidence, "testimonial" questions by counsel, and general questions on general matters never tied to the facts of this case.

38. The physical evidence in this case was retained by the Court until April 3, 1980, at which time it was turned over to the District Attorney. It was thereafter destroyed. At no time after Fleishman was hired in March or April, 1978, was any attempt made to have the physical evidence tested or preserved.

39. All of the matters presented to the Court at this hearing could have been presented within the time provided for in Rule 45 had defendant been diligent.

40. The state has been irreparably prejudiced by the failure of the defendant to timely file this motion because of the deterioration of the memories of the witnesses and the destruction of the physical evidence.

41. A portion of the delay in presenting the matter is attributable to defendant's escape from the penitentiary and his unavailability until recaptured in Hawaii.

42. The decision to proceed to trial in February was made by Smith in consultation with Harris and the Smith family when Smith decided he did not want to wait and remain incarcerated until April, 1978, the next available trial calendar.

43. Harris permitted the bar disciplinary proceeding to proceed by default and no decision was made based upon the taking of evidence.

44. Randy Samuel Newell was never convicted of possession or sale of MDA, the only conviction the state had reason to believe had occurred.

45. Harris had the benefit of conferring on legal strategy and tactics with a number of defense attorneys, and was able to take advantage of their investigative resources as well as his own during the preparation for the trial of Smith.

46. Harris vigorously objected to evidence damaging to his client's cause at the appropriate times, vigorously cross-examined witnesses against his client in an appropriate manner, and argued strenuously on behalf of his client in this cause when appropriate.

47. Harris had the benefit of the record of the first trial in which he participated, the record of the Grand Jury proceedings, and other statements and depositions of witnesses, as he prepared for the second trial of Smith.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter of this suit.

2. The asserted newly discovered evidence is not sufficient to grant a new trial because:

a) the asserted newly discovered evidence would not probably change the jury verdict or create a reasonable doubt where one did not otherwise exist;

b) the asserted newly discovered evidence is merely cumulative, impeaching, contradictory, or is evidence that counsel speculates would lead to something beneficial; and,

c) the motion was not filed within the time limits of Rule 45 due to defendant's actions.

3. The state disclosed all exculpatory evidence as required by law.

4. Harris prepared and presented this case with far more skill, judgment, and diligence than that expected of a reasonably competent defense counsel.

5. Judgment should be entered in conformity with these Findings of Fact and Conclusions of Law.

/s/ Gerald R. Cole
GERALD R. COLE,
DISTRICT JUDGE

APPENDIX F

591 P.2d 664

STATE of New Mexico,
Plaintiff-Appellee,

v.

William J. SMITH, Defendant-Appellant.

No. 11905.

Supreme Court of New Mexico.

Feb. 27, 1979.

Defendant was convicted in the District Court, Bernalillo County, Gerald R. Cole, J., of first-degree murder and he appealed. The Supreme Court, McManus, Senior Justice, held that: (1) trial court did not err in admitting defendant's sawed-off shotgun, despite contention that there was no way to connect gun with the deaths of either of murder victims and that prejudicial effect of evidence outweighed its probative value; (2) trial court did not abuse its discretion in refusing to admit evidence pertaining to drug habits of the victims; (3) evidence sustained conviction; (4) rule of criminal procedure entitling defendant to any record of prior convictions of witnesses which district attorney intended to call at trial did not entitle defendant to information concerning prior arrests of witnesses, and (5) where defendant on direct examination testified that he had bought gun for protection and on cross-examination stated that he needed the gun to protect himself from named police officer who had threatened his life, on rebuttal the State properly presented that police officer's testimony that he had repeatedly stopped defendant for various offenses over certain period of time

and that on one occasion the defendant had threatened his life.

Affirmed.

Warren O. F. Harris, Albuquerque, for defendant-appellant.

Toney Anaya, Atty. Gen., Janice Marie Ahern, Charlotte Hetherington Roosen, Asst. Attys. Gen., Santa Fe, Virginia Ferrara, Asst. Dist. Atty., Albuquerque, for plaintiff-appellee.

OPINION

McMANUS, Senior Justice.

August 19, 1977 defendant William J. Smith and a co-defendant were charged with the crimes of murder, kidnapping, accessory to murder, and accessory to kidnapping. The trials of the defendants were severed, and Smith was tried October 11, 1977. The trial court granted Smith's motion for a directed verdict of acquittal as to the kidnapping charges. At the end of the trial, the court declared a mistrial because the jury was unable to reach a unanimous decision. Smith was subsequently re-tried on January 30, 1978 and was convicted of the first-degree murders of Leslie D. McDonnell and Cari Talton, a/k/a Carie Newell. Smith appeals those convictions, alleging fourteen points of error. We will discuss each point separately.

POINT I

Smith filed a motion to quash the grand jury indictment because he was denied his right to a fair presentation of evidence to the grand jury and denied his rights to due process and equal protection under the Constitution of the State of New Mexico and the Constitution of the United States. Smith argues that the indictment resulted from an uninformed and misled grand jury because the district attorney knowingly failed to present exculpatory evidence at the grand jury proceeding. The trial court denied the motion, and Smith claims error.

We decline to review the trial court's ruling on this motion. Smith failed to provide this Court with a record of the hearing on the motion to quash the indictment. Therefore, Smith waived his right to challenge the ruling of the trial court. Matters outside the record present no issue for review. *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct.App.1975).

POINT II

Smith claims that the trial court erred by not granting his motion to reduce bond. Smith contends that bond set at $100,000 was unreasonable in light of the fact that his first trial resulted in a mistrial.

Again, we find that no issue is presented for review. The remedy for a defendant claiming an excessive setting of bail is found under N.M.R.Crim.P. 26, N.M.S.A.1978. Rule 26 provides for an appeal from orders regarding release entered prior to a judgment of conviction. This rule specifically includes orders setting bond. Review of a

motion to reduce bond at this point is not warranted because the trial court's ruling on bond has no relation to the merits of an appeal from a conviction. *State v. Cebada,* 84 N.M. 306, 502 P.2d 409 (Ct.App.1972). Furthermore, in New Mexico the amount of bail set by a trial court is within the sound discretion of the trial court. N.M.R.Crim.P. 22, N.M.S.A.1978, There has been no showing that the trial court abused is discretion in denying Smith's motion for bond reduction.

POINT III

Smith claims his conviction should be reversed because the conduct of law enforcement officials violated his constitutional rights to due process and equal protection.

Smith alleges that the law enforcement officers who prepared the affidavit for search warrant included erroneous and misleading evidence and information on the affidavit. Smith attacked the search warrant in a suppression hearing, however, he has failed to provide this Court with any record of evidence presented at that hearing. Smith's only reference indicating errors in the search warrant is to tapes of the trial. These tapes have no bearing on the search warrant. Thus, the general allegations of unfairness made by the defendant are not supported in the record. General allegations present no issue for this Court to review. *State v. Romero, supra.*

Smith also asserts that the State's attorneys acted improperly at the grand jury proceedings. Smith contends that the prosecuting attorneys knowing failed to

present exculpatory evidence in the grand jury proceedings. In addition, Smith argues that these attorneys presented the evidence and made certain comments to the grand jury in such a way as to improperly influence the decision of the grand jury. Finally, Smith alleges that certain oral testimony heard before the grand jury was not recorded in violation of § 31-6-8, N.M.S.A. 1978 [formerly § 41-5-8, N.M.S.A. 1953 (Repl.1972)]. Smith has not forwarded the grand jury minutes to this Court, so again, we have no record to review.

The alleged violations of due process and equal protection made by the defendant are not supported in the record, nor does the defendant provide any authority to this Court in support of his allegations. A general claim of denial of a fair trial cannot provide a basis for relief. *State v. Paul*, 83 N.M. 527, 494 P.2d 189 (Ct.App.1972).

POINT IV

Smith contends that the trial court erred in not granting his motion to dismiss the indictment for lack of venue and jurisdiction in the District Court of Bernalillo County. A Torrance County rancher discovered the bodies of the two girls on his ranch, and the crime was allegedly committed in Torrance County.

The trial court did not err by denying Smith's motion. The Bernalillo County District Court had jurisdiction over this case because there was no evidence that the crime occurred in a place other than New Mexico. *See State v. Ramirez*, 89 N.M. 635, 556 P.2d 43 (Ct.App.1976); *State v. Losolla*, 84 N.M. 151, 500 P.2d 436 (Ct.App.1972). In addition, venue was proper in Bernalillo County

because there was substantial evidence that the defendant formed the intent to kill both girls in Bernalillo County. If elements of a crime were committed in different counties, the trial may be held in any county in which a material element of the crime was committed. *State v. Wise*, 90 N.M. 659, 567 P.2d 970 (Ct.App.1977), *cert. denied*, 91 N.M. 4, 569 P.2d 414 (1977).

POINT V

Smith argues that the trial court abused its discretion in denying his motion for a continuance because he was not emotionally or mentally able to prepare for the trial on its originally scheduled date.

The standard of review on a denial for a motion for continuance is whether the trial court abused its discretion to the prejudice or injury of the defendant. *Doe v. State*, 88 N.M. 347, 540 P.2d 827 (Ct.App.1975), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975); *State v. Brewster*, 86 N.M. 462, 525 P.2d 389 (Ct.App.1974); *State v. Garcia*, 82 N.M. 482, 483 P.2d 1322 (Ct.App.1971). In this case, Smith has failed to present any evidence supporting the claims made in his motion for continuance. As there has been no showing that the denial of defendant's motion was prejudicial or that substantial justice would have been more clearly obtained if a continuance had been granted, we must uphold the trial court's decision.

POINT VI

Smith argues that the trial court erred in admitting his sawed-off shotgun because there was no way to connect the gun with the deaths of either of the girls and because the prejudicial effect of the evidence outweighed its probative value.

The admission of evidence is within the sound discretion of the trial court, and its ruling will be upheld unless there is a showing of abuse of discretion. *State v. Bell*, 90 N.M. 134, 560 P.2d 925 (1977). After reviewing the record, we find no such abuse.

POINT VII

Smith argues that the trial court's limitation of his cross-examination of various State witnesses concerning the character and habits of the two victims deprived him of a fair trial and of his constitutional right to confront the witnesses against him.

Where character is an element of the crime, claim, or defense, there is no question as to its relevancy and its admission is governed by N.M.R.Evid. 402, N.M.S.A.1978. *State v. Bazan*, 90 N.M. 209, 561 P.2d 482 (Ct.App.1977), *cert. denied*, 90 N.M. 254, 561 P.2d 1347 (1977). In all other cases character evidence is collateral, so its admissibility is limited to the exceptions outlined in N.M.R.Evid. 404, N.M.S.A.1978. *State v. Bazan, supra; State v. Marquez*, 87 N.M. 57, 529 P.2d 283 (Ct.App.1974), *cert. denied*, 87 N.M. 47, 529 P.2d 273 (1974). The pertinent part of Rule 404 provides:

> (a) CHARACTER EVIDENCE GENERALLY.
>
> Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> * * *
>
> (2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor * * * .

As we stated previously, the admission of evidence is within the sound discretion of the trial court. *State v. Bell, supra; State v. Marquez, supra.* The trial court did not abuse its discretion in refusing to admit evidence pertaining to the drug habits of the victims.

POINT VIII

Smith argues that the trial court erred in denying his motion for directed verdict of acquittal because the verdict is not supported by the evidence.

A directed verdict is not proper where there is substantial evidence to support the conviction. *State v. James,* 85 N.M. 230, 511 P.2d 556 (Ct.App.1973), *cert. denied,* 85 N.M. 228, 511 P.2d 554 (1973). The fact that some of the evidence is circumstantial does not alter the policy of affirming a conviction on appeal where the evidence taken as a whole supports the verdict. *State v. Adams,* 89

N.M. 737, 557 P.2d 586 (Ct.App.1976), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976). The question before this Court is whether the direct or circumstantial evidence admitted at trial, together with all reasonable inferences to be drawn therefrom, will sustain a finding of guilt beyond a reasonable doubt. *See State v. Adams, supra.* After reviewing the record, we find that each element of the crimes charged is supported by substantial evidence. The trial court properly denied defendant's motions for directed verdict.

The defendant also claims that the trial court erroneously denied his motion for a new trial. N.M.R.Crim.P. 45, N.M.S.A.1978 provides that the court may grant a new trial if required in the interest of justice. Such a motion is addressed to the sound discretion of the trial court, and the denial of such a motion will be upheld on appeal unless it can be shown there was a clear abuse of discretion. *State v. Wright*, 84 N.M. 3, 498 P.2d 695 (Ct.App. 1972). Smith has failed to present any facts which would indicate the trial court's ruling was arbitrary, capricious or beyond reason. *See State v. Kincheloe*, 87 N.M. 34, 528 P.2d 893 (Ct.App.1974).

POINT IX

Smith argues that the trial court erred in forcing him to produce a witness for the State. The State submits that Smith's allegations are without merit. Ginger Donham, who was listed as a witness by both the prosecution and the defense, was expecting to deliver a child the same week as the trial. Her doctor refused to let her make the trip from California by car. And, the State presented an affidavit indicating that as a general policy, airlines refuse

to carry women as passengers if they are past their eighth month of pregnancy. The trial court declared Ms. Donham unavailable and indicated it would allow the playing of her tape-recorded testimony from the previous trial. Although the trial court felt it could not order the State to produce Ms. Donham, the court did say she could appear voluntarily if she chose to do so. Ms. Donham testified at trial the next day.

N.M.R.Evid. 804(b), N.M.S.A.1978 provides that the former testimony of a witness is not hearsay and is admissible in a subsequent proceeding if the witness is unavailable at the subsequent proceeding. Subsection (a)(4) of Rule 804 defines a witness as "unavailable" when he:

> is unable to be present or testify at the hearing because of death or then existing physical or mental illness or infirmity * * * .

The trial court has discretion to determine whether the burden of showing unavailability has been met. The ruling of the trial court will not be disturbed absent a showing of abuse of that discretion. *State v. Mann*, 87 N.M. 427, 535 P.2d 70 (Ct.App.1975); *State v. Holly*, 79 N.M. 516, 445 P.2d 393 (Ct.App.1968). It is the opinion of this Court that the trial court did not abuse its discretion in refusing to order Ms. Donham's attendance. Defendant's claim that he was forced to produce a witness for the State is without merit.

Smith also contends that the trial court erred in limiting his cross-examination of Ms. Donham during the State's case in chief. N.M.R.Evid. 611(a), N.M.S.A.1978 gives the trial court the power to control the mode and

order of interrogating witnesses and presenting evidence. Rule 611(b), N.M.S.A.1978 gives the trial court the power to control the scope of cross-examination of a witness or witnesses. The exercise of the judge's discretion in controlling the order of witness or witnesses. The exercise of the judge's discretion in controlling the order of witnesses or the mode of interrogation will not be disturbed except upon a showing of abuse of that discretion. *State v. Bell, supra; State v. Wesson,* 83 N.M. 480, 493 P.2d 965 (Ct.App.1972). We find no such abuse here.

POINT X

Smith contends it was error for the trial court to deny his motion for "a list of all sawed-off shotguns presently being held in the Albuquerque Police Department's Evidence Room and a list of any and all sawed-off shotguns that came into the possession of the Albuquerque Police Department and other law enforcement agencies, both State and Federal during the year of 1977." N.M.R.Crim.P. 27(a)(5), N.M.S.A. 1978 provides that the defendant can obtain:

> Any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant * * * .

In order to obtain a new trial for a violation of subsection (a)(5), the non-disclosed items must be material to the guilt or innocence of the accused or to the penalty to be

imposed. *Chacon v. State,* 88 N.M. 198, 539 P.2d 218 (Ct.App.1975). In addition, where the non-disclosure does not prejudice the defendant, there are no grounds for reversal. *Chacon v. State, supra.* In this case, Smith has failed to provide this Court with any record indicating that the records were in the control or custody of the State, or that they were material to his defense. Matters outside the record present no issue for review. *State v. Romero, supra.*

Smith also contends that it was error for the trial court to deny his motion for the complete record of all arrests and convictions of the State's witnesses. Under N.M.R.Crim.P. 27(b), N.M.S.A.1978, the defendant is entitled to a written list of the names and addresses of all witnesses which the district attorney intends to call at trial and any record of prior convictions of any such witness which is within the knowledge of the district attorney. The defendant was not entitled, under the rules, to information concerning prior arrests. Furthermore, the defendant did not provide any other basis which would entitle him to disclosure of a witness' arrest records. Disclosure which is not required under the Rules of Criminal Procedure or as a matter of constitutional policy [*see Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] must necessarily fall within the exercise of the judge's discretion. In this case there has been no showing of an abuse of discretion by the trial court.

POINT XI

As part of its rebuttal, the State presented Albuquerque Police Department Officer Burwash. Officer Burwash

testified that he had repeatedly stopped the defendant for various offenses over a certain period of time, and that on one occasion, the defendant had threatened his life. Smith contends that the trial court erred in permitting this testimony of Officer Burwash because it was not relevant, it put Smith's character in issue, and it was evidence of other crimes.

The State submits that the testimony of Officer Burwash was properly admitted because it specifically rebutted the testimony of the defendant. On direct examination the defendant testified that he had bought a gun for protection. On cross-examination the State inquired as to Smith's need for protection, and Smith answered that he needed the gun to protect himself from Officer Burwash, who had threatened his life. The State argues that Officer Burwash's testimony properly rebuts the defendant's testimony regarding the threat and the defendant's need to carry a sawed-off shotgun. We agree with the State.

The issue of protection from a police officer was injected by the defendant. It is well settled that a defendant cannot be heard to complain on appeal that he was prejudiced by evidence which he introduced into the case. *State v. Harrison*, 81 N.M. 324, 466 P.2d 890 (Ct.App.1970); *State v. Sedillo*, 81 N.M. 47, 462 P.2d 632 (Ct.App.1969), *cert. denied*, 81 N.M. 40, 462 P.2d 625 (1969); *State v. McFerran*, 80 N.M. 622, 459 P.2d 148 (Ct.App.1969), *cert. denied*, 80 N.M. 731, 460 P.2d 261 (1969). The State was entitled to correct the false impression given to the jury through rebuttal testimony. *State v. Bazan, supra.* The admission of rebuttal testimony is within the discretion of the trial court and will not be

disturbed absent an abuse of discretion. *State v. Garcia*, 83 N.M. 794, 498 P.2d 681 (Ct.App.1972). We find no abuse of the trial court's discretion in allowing the rebuttal testimony of Officer Burwash.

POINT XII

Smith argues that it was error for the trial court to allow the rebuttal closing argument by the State because the argument did not relate to the facts of the case and was intended to inflame the passions and prejudices of the jury. As a general rule, having failed to object to the closing rebuttal of the prosecution in a timely manner, Smith would waive any claim of error on the appellate level. *State v. Victorian*, 84 N.M. 491, 505 P.2d 436 (1973); *State v. Vallejos*, 86 N.M. 39, 519 P.2d 135 (Ct.App.1974). In this case, however, Smith contends that the rebuttal argument was improper per se and should not have been allowed each though an objection was not entered by the defense. We disagree. In criminal cases, the prosecutor is allowed a reasonable amount of latitude in closing remarks to the jury. *State v. Pace*, 80 N.M. 364, 456 P.2d 197 (1969). After reviewing the taped transcript, we cannot say that the rebuttal closing argument was improper per se.

POINT XIII

Smith argues that the trial court erred in denying his motion to disqualify the entire jury panel because of the members' bias and preconceived notions about the case.

After reviewing the record, it is our opinion that the defendant has failed to show that his jury was not impartial. In addition, Smith only exercised eight of the twelve peremptory challenges he was entitled to under N.M.R.Crim.P. 39, N.M.S.A. 1978. A defendant cannot claim prejudice for failure to dismiss prospective jurors if he fails to exercise available peremptory challenges. *State v. Gurule*, 84 N.M. 142, 500 P.2d 427 (Ct.App.1972).

POINT XIV

Smith contends that the trial court erred in refusing to give N.M.U.J.I.Crim. 40.01, 40.24 and 41.30, N.M.S.A.1978. These instructions are concerned with the sufficiency of circumstantial evidence, weighing conflicting testimony, and the alibi defense. In the Use Notes of the Uniform Jury Instruction, the Supreme Court has indicated that these instructions should not be given. However, Smith argues that these instructions should be given because they do represent an accurate statement of the law.

A similar defense claim was raised in *State v. Johnson*, 91 N.M. 148, 571 P.2d 415 (Ct.App.1977) where the Court of Appeals stated:

> The Use Note to U.J.I.Crim. 40.01 states that no instruction on circumstantial evidence is to be given. In spite of this direction, defendant complains of the trial court's refusal to instruct on circumstantial evidence. We are bound to following the directions of the Supreme Court on this matter. *State v. Scott*, 90 N.M. 256, 561 P.2d 1349 (Ct.App.1977).

Id. at 153, 571 P.2d at 420. The trial court properly following the mandate of this Court and refused defendant's requested instructions.

For the foregoing reasons, the decision of the trial court is hereby affirmed.

IT IS SO ORDERED.

EASLEY and FEDERICI, JJ., concur.